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SAFEGUARDING THE ILLEGAL: RETHINKING THE INTERFACE BETWEEN LABOUR AND IMMIGRATION LAWS.

MASTER OF PHILOSOPHY IN LABOUR LAW

Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Philosophy in Labour Law in approved courses and minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

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Declaration

I hereby declare that I have read and understood the regulations governing the submission of Master of Philosophy in Labour Law dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

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Abstract

The rendering of work by foreigners without the authorization to work is a contentious issue in South Africa. South Africa possesses one of the most progressive Constitutions, yet many are left at the fringes of the economy with little protection. Despite constitutional entrenchment of fundamental labour rights, many well-deserving workers are disentitled from important labour protections because their employment contract violates immigration laws. Unauthorized workers are formally excluded from access to certain legal institutions and economic benefits as most of the protective labour laws are centred on an existing employer-employee relationship. The reliance on the definition of ‘employee’ by almost all the relevant laws tends to leave a vast majority of working people devoid of vital legislative protections. The position of unauthorized foreign workers draws attention to the conflicting interplay between South Africa’s immigration and labour laws. While there is no easy solution to the current situation; if a practical interface is not found, these competing regimes will do more damage.

List of Abbreviations

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
DRC	Democratic Republic of Congo
EEA	Employment Equity Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and Communications Technology
ILO	International Labour Organization
IOM	International Organization for Migration
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
MHSA	Mine Health and Safety Act
ODIMWA	Occupational Diseases in Mines and Works Act
OHCHR	Office of the High Commissioner for Human Rights
OHSA	Occupational Health and Safety Act
SADC	Southern African Development Community
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UN	United Nations

Introduction

Imagine if you will, the following scenarios: a Ghanaian young woman braiding hair at a small beauty salon in a student-packed neighbourhood. In fact, she has no qualification for this trade but it is her only source of livelihood. Down in the city, a Congolese man is driving passengers back and forth in his worn taxi in order to send money home. A Somali is selling crisps and sweets in his portable kiosk by the roadside just to be able to feed his small family. In the private quarters of Constantia, you will find a Malawian woman polishing the floors of dream homes she will never afford in her lifetime. In the same locality, a Zambian is busy at work mowing lawns and planting flowerbeds. Far out of the metropolitan into the farmlands, hundreds of Zimbabwean farm helpers are hard at work getting next season's fruits ready in time for your purchase. Moving further up into the country on a mine somewhere, a Mozambican is deep down in a pit surveying for gems. Although these peoples' lives may be different in so many ways, they have two things in common: one, they are working outside of their home country trying to make an honest living; and two, they are all pursuing their 'decent' jobs without proper documents. Though these scenarios may appear fictional, they are not that far-removed from the everyday reality of some people. The lack of reliable evidence to support these scenarios does not deter from the fact that these people live and work among us. A closer look at any community will reveal many heavily accented exotic faces offering one service or other.

Rational for topic

Truth be told, South Africa has been attracting an increasing number of foreigners since democracy. These foreigners are not only coming from neighbouring Zimbabwe, but all over Africa. Migration is an existing phenomenon and clandestine migration an even bigger problem in the new world order. People move from one place to another for varied reasons. While most migration may occur legally, a significant proportion takes place illegally. Whatever their motivation (be it administrative difficulties or sheer disregard for the law) for becoming unauthorized; many foreigners find themselves working, albeit without proper documentation, to survive.

The Immigration Act 13 of 2002 regulates the employment of foreign workers in South Africa, to ensure the economic development of the country by reserving employment for nationals or otherwise needed qualified foreigners. It does so by peremptorily prohibiting the employment of foreigners without a valid work permit. Despite the legislative ban contained in the Immigration Act 13 of 2002, there are still a significant number of foreigners currently engaged in employment without the required work permits. Although the Act exclusively criminalizes only the conduct of an employer (not the foreigner) who employs a foreign worker without a valid permit,¹ the worker still runs the risk of exploitation by labour providers, criminalization and even deportation by authorities if discovered.

Some quarters will argue that the very nature of their status makes unauthorized migrants “criminals”, who are undeserving of any legal protection. The argument goes something like this: any contract of employment entered into with unauthorized workers cannot be valid or enforceable because such a contract violates the country’s immigration laws. As a result, these workers do not acquire ‘employee’ status in terms of South African law and are therefore should not be covered by South African labour law. Although this argument may be vindicated given the precarious legal position of these workers, it begs an important question: does one sacrifice any entitlement to basic rights and protections merely by being in a country illegally? Surely, their powerlessness, impending extradition and probable persecution for immigration violations is enough punishment without having to deny them access to important legislative protections as well.

There are other quarters, however, who advocate for the extension of some labour protection to unauthorized foreigners based on their vulnerability as atypical workers. In line with this, the international community (specifically the International Labour Organization and United Nations) has developed a regulatory system intended to address issues related to migration at global, regional and national levels as well as direct efforts to protect unauthorized migrant workers’ rights. Despite this progress, clandestine migration and the position of unauthorized foreign workers remain tentative. Accordingly, this paper aims to explore whether foreign workers working in South Africa without authorization are deserving of the same, if any,

¹ Section 42 of Act 13 of 2002.

legislative protection. Hence, the research question is formulated as follows: Are unauthorized foreigners working in South Africa deserving of any legislative protection?

Structure of the paper

Promotion of merging immigration and labour laws is a common thread running through each of the following chapters. Chapter 1 begins with a review of the main trends in migration flows and the impact of international migration on the economy and labour market. Chapter 2 assesses the international normative framework on labour migration, covering both ILO standards and those developed by the United Nations. Chapter 3 reviews domestic law regulating labour migration in South Africa, and chapter 4 examines domestic case laws regarding unauthorized foreign workers. Chapter 5 analyses the issue of whether or not foreigners working in South Africa without authorization are deserving of legislative protection, paying particular attention to basic human rights protection, individual and collective labour protections, and social protection. It highlights the vulnerability of migrant workers to exploitation, abuse and human right violations necessitating the need for the extension of some legislative protections. Chapter 6 shows how the legal treatment of unauthorized foreign workers exacerbates already present social and economic issues. Lastly, chapter 7 draws upon the conclusions of the thematic discussions in the preceding chapters and addresses the way forward for reconciling the two laws.

For the purposes of this paper, “unauthorized foreign worker” is operationalized as a foreigner working in South Africa without the relevant work permits. The terms “unauthorized foreign workers”, “unauthorized workers” and “unauthorized migrants” are used interchangeably; and carry the same connotation unless otherwise indicated.

Chapter 1 Globalization: global labour migration and the need for border control

‘When people cannot find work at home in their communities and societies they look elsewhere’²

Globalization is changing the world over. Recent advancements in technologies have eased the movement of capital, services, goods, information, and to some extent people from one country or continent to another.³ One cannot discuss migrant workers without a closer look at globalization as globalization is at the heart of migratory flows. Globalization is a contested concept among people in academia and practice. Despite the deferring characterizations, all can attest that globalization entails elements of ‘compression of time and space, increase in interconnectivity of people, as well as an increase in the degree of exchange of commodities, people and ideas.’⁴ Globalization has not only increased the movement of commodities worldwide, but has made it possible to connect international markets because of developments in Information and Communications Technologies (ICTs).⁵ While the world markets are now interlinked, this has led to increased competition and subsequently labour markets segmentation. This has resulted in a formal economy with highly skilled jobs requiring skilled and knowledgeable workers operating concurrently to an informal economy characterized by low skilled jobs reliant on low-skilled migrants.⁶ Furthermore, it is proposed that globalization is usually considered in terms of its impact on ‘human agency.’⁷ This suggests that the well-being of people as they experience ‘globalization’ is central to understanding the phenomenon itself. If this notion is taken further, it can be ascertained that the

² International Labour Organization *International labour migration: A rights-based approach* (2010) 13.

³ Ibid.

⁴ Toby Shelley *Exploited: Migrant labour in the new global economy* (2007) 5.

⁵ Supra note 1 at 14.

⁶ Ibid at 24.

⁷ Thomas Cushman The globalization of human rights in Bryan S. Turner (Ed.) *The Routledge international handbook of globalization studies* 589.

experiences or well-being of migrant workers is vital to understanding the current labour global migration trend.

This chapter is primarily concerned with those factors necessitating migration for employment and the subsequent need for influx/ border control. It is important to note that the focus is on those people who have little or no education and/or special skills working abroad, and not the privileged skilled few who have the potential to legally relocate or become permanent residents. While labour migration is a worldwide phenomenon, the African perspective, particularly the South African context is of interest here.

1.1 Global migration for employment

International migration is considered both a cause and consequence of globalization.⁸ Advancements in technologies (thus globalization) may have aided in linking the world's markets; but it has also increased inequalities in employment opportunities, income and living standards, and human security across the world.⁹ International migration for labour is not geographically limited but a widespread phenomenon involving complex distribution flows.¹⁰ Migration flow used to be typically from developing/poor nations (the South) to more developed/rich nations (the North).¹¹ This is no longer the case. Migration is taking various forms: North-North, South-South, South-North, and in some cases North-South.¹² Labour migration essentially occurs within and across all continents in every direction.

The world's total migration population, that is people living outside their country of birth/citizenship, is estimated to be about 214 million people.¹³ According to the International Labour Organization (the ILO) a large proportion, about 86

⁸ Robin Cohen *Migration and its enemies: Global capital, migrant labour and the nation-state* (2006) 177.

⁹ Supra note 1 at 14.

¹⁰ Ibid.

¹¹ Supra note 4.

¹² Supra note 1 at 210.

¹³ Henry Zlotnik et al *Data and analysis: Partnering to better understand and address the human development implications of migration* (2010) 1.

million, of these international migrants are migrant workers, with Africa alone accounting for about 7.1 million of them.¹⁴ In South Africa, the actual number of migrants entering and living in the country is indefinite. Whatever the estimation, there is consensus that migration into the country has and continues to increase.

As international migration grows, nations are implementing more and more complex immigration laws and border controls to restrict the mobility of people into their borders.¹⁵ In spite of tightening immigration controls the world over that restrict, control, or manage immigrants; international migration continues to increase.¹⁶ The question then is why do people continue to leave their country of origin for places they are not welcomed?

1.2 Driving forces

People may decide to leave their country of origin for varied reasons because no one situation or lived experience is the same. Wars, famine, poverty, unemployment, pressures on scarce resources, political unrest, income inequality between poor and rich countries, and human rights abuses in certain countries are among some of the major factors known to drive people into migration.¹⁷ The African continent; in particular the Southern Africa region; has known its fair share of migration, including undocumented migration.

While migration in Southern Africa is nothing new to the region, the economic and political climates in some countries on the continent drive its current surge.¹⁸ Civil wars and political unrest in places like Angola, Mozambique, the DRC, Ivory Coast, Sudan and Chad (to list a few) has left many people displaced, impoverished and desperate to find a better life elsewhere. The civil war in Mozambique alone is estimated to have generated around 1.5 million refugees.¹⁹

¹⁴ International Labour Organization *Facts on labour migration* (2006) 1.

¹⁵ Supra note 2 at 14.

¹⁶ Supra note 8 at 184.

¹⁷ Supra note 2 at 20.

¹⁸ Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 12.

¹⁹ Ibid at 13.

Likewise, current political and economic circumstances in Libya, Somalia, Egypt and Zimbabwe have caused many to flee from oppression and severe human rights abuses. If popular news media is anything to go by, the frightening reports emanating from these places shed light on why some people would much rather live elsewhere than their home country. As people leave these oppressive regimes to safer territories, there is not much choice for refuge. Situated at the southern most point of Africa, there is nowhere to go beyond its borders. Consequently, South Africa has forcibly become a major migrant-receiving country on the African continent. South Africa, being one of the more stable and wealthier countries left on the continent, anticipates absorbing the population excesses. To illustrate this point, between the periods of 1994 to 2001 alone, South Africa received about 64 000-refugee status applications, majority of which were from Congolese (DRC) applicants.²⁰ Whatever the motivation for leaving, it is certain that the prospects of relatively favourable conditions elsewhere are enough to pull desperate people away from their own countries.²¹

1.3 Clandestine migration

Not all migration occurs legally. Some migrants may enter, stay and even work against the immigration law of the destination country, either of their own accord or because they are forced to.²² Voluntary unauthorized labour migration can take two main forms, those who deliberately enter unlawfully and those who enter legally but overstay their official duration.²³ Whatever the form, clandestine border movement is very much prevalent in Southern Africa. South African borders, particularly the border shared with Zimbabwe, have become undeniably porous for undocumented workers as people commonly cross without going through immigration posts.²⁴ Since 1990, South Africa has deported over one million foreigners from its interior, the

²⁰ Loc cit.

²¹ Supra note 17.

²² Ibid.

²³ Ibid.

²⁴ Supra note 8 at 184.

majority being Mozambican and Zimbabwean nationals.²⁵ The complex nature of unauthorized border crossing for work makes it difficult, nearly impossible, to produce precise estimates or statistical data on the undocumented migrant population.²⁶ Yet some have put forward conservative estimates ranging in the thousands, while others have presented exaggerated figures in the millions solely based on pseudo-scientific data.²⁷ Whilst the exact proportion of people constituting the illegal migrant population is unknown, the ILO approximates that about 10-15 per cent of all international migration that take place are unauthorized.²⁸ Regardless of the unreliability of these estimates, unauthorized migration is a reality for many countries, including South Africa. This phenomenon requires swift attention as it can negatively affect both the host nation economy and the migrants themselves. Becoming unauthorized in a foreign land leaves one susceptible to human rights violations and marginalization of the worse kind.

1.4 Current situation

Unauthorized migrants often incur great risks to get to their destination countries and worse hardships once they are inside.²⁹ The ILO asserts that migrants entering or working in countries without the appropriate documents are likely to be subjected to high levels of exploitation, risk of forced labour and abuse of human rights.³⁰ In South Africa, like most places, migrant workers tend to do jobs locals avoid or reject. Locals who reject them regard these jobs as ‘mundane, dirty, degrading or even dangerous.’³¹ These jobs usually constitute paring conditions of employment

²⁵ Supra note 18 at 12.

²⁶ International Labour Organization *International labour migration: A rights-based approach* (2010) 32; Robin Cohen *Migration and its enemies: Global capital, migrant labour and the nation-state* (2006) 184.

²⁷ Jeff Handmaker et al ‘Migration, refugees, and racism in South Africa’ (2001) 20(1) *Refuge* 40 at 41.

²⁸ International Labour Organization *Facts on labour migration* (2006) 1.

²⁹ Supra note 26 at 36.

³⁰ Supra note 28.

³¹ Shelley at 137.

that border on slavery. For instance, compared with their national counterparts; migrant workers work longer hours, are grossly underpaid, often squeezed of the highest possible productivity and are subjected to discrimination, xenophobia and abuse.³² They may accept meagre income purely because they are comparably more favourable to that of potential earnings at home.

Most often, these foreign workers are completely ignorant of their rights, if they have any, or tricked into relinquishing them entirely.³³ As a result, violations of their basic human rights occur in spite of international instruments. At the extreme end of the issue, labour providers trap unauthorized migrants into a form of 'forced labour'. Employers may make use of an unauthorized migrant's status as advantage to get him or her to bend to their rules and wishes.³⁴ Employers generally use the 'threat of handing unauthorized foreigners over to immigration authorities' as a bargaining chip in the exploitation process.³⁵ Studies into commercial agriculture, construction and secondary sectors, unauthorized migrants sectors, have shown incidences of lowest wages, extensive exploitation and labour standards infringements.³⁶ One acknowledges that curtailing the influx of unauthorized foreign workers may be necessary for political and economic reasons; however, their precarious legal positions make them extremely susceptible to exploitation and abuse of the worse kind and as a result should be managed and safeguarded.³⁷

³² Supra note 28.

³³ Supra note 31 at 6.

³⁴ Ibid at 7.

³⁵ Idem.

³⁶ Supra note 18 at 13.

³⁷ Supra note 26 at 35.

Chapter 2 International and regional instruments: the role of the International Labour Organization and the United Nations

‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’³⁸

The rapid growth of international migration for employment has raised the need for its governance and regulation at an international level. Accordingly, international instruments are necessary to guide and synchronize various national legislations, policies and practices in order to protect both migrant workers and State interest.³⁹ International standards that confer rights to migrant workers are numerous and vary. Some are broad and general, thus apply to all humans and workers, others are specifically targeted at migrant workers.⁴⁰ The ILO and the United Nations (UN) are the two prominent bodies concerned with labour standards pertaining to migrant workers in the international arena.

2.1 International instruments guaranteeing human rights

All “human beings”, including unauthorized migrant workers are entitled to their basic human rights. The Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights jointly form the umbrella instrument, the International Bill of Human Rights, guaranteeing and protecting human rights for all.⁴¹

The Universal Declaration of Human rights, adopted in 1948 by the UN General Assembly, affords general basic human rights and fundamental freedoms to everyone without distinction or discrimination.⁴² Therefore, everyone, regardless of

³⁸ Article 1 of the Declaration of Human Rights. Available at <http://www.un.org/en/documents/udhr/>

³⁹ *International labour migration: A rights-based approach* (supra note 26) at 117.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at 118.

⁴² United Nations *Fact sheet No.2 (Rev.1), the International Bill of Human rights* (1996).

race, creed, gender, nationality, language or even employment status, is entitled to the same set of human rights under the Declaration.⁴³ As a general instrument, the Declaration does not require official acceptance by States for its principles to apply.⁴⁴ It contains Articles specifically addressing work and employment. Article 23 of the Declaration grants the right to work, free choice of employment, right to just and favourable conditions of work, as well as right to equal pay for equal work without discrimination.⁴⁵ While Article 24 grants the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.⁴⁶

Unlike the Universal Declaration, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) are more targeted than general. They are only legally binding on States upon their ratification or accession. Both Covenants have Articles that pertain to rights relevant to migrant workers. These provisions recognize the right to work; to just and favourable conditions of work; to freedom of association; to social security; and freedom from slavery, servitude and forced or compulsory labour among others.⁴⁷ While the rights conferred by all three instruments apply to all people without discrimination, national laws can limit them as far as the limitation promotes general welfare.

2.2 ILO standards and UN instruments

One of the ways the ILO regulates migrant labour is through the provision of fundamental labour standards that apply to all persons. In 1998, the ILO adopted its Declaration on Fundamental Principles and Rights at Work to promote human rights

⁴³ Article 2 of the declaration states “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.” Available at <http://www.un.org/en/documents/udhr/>

⁴⁴ Supra note 42.

⁴⁵ Available at <http://www.un.org/en/documents/udhr/>

⁴⁶ Ibid.

⁴⁷ Supra note 42.

at work.⁴⁸ The Declaration comprises of four ILO fundamental labour principles, namely: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect to employment and occupation.⁴⁹

The freedom of association and its effective recognition of the right to collective bargaining principle are made of Conventions 87 and 98, which guarantee the right of employers and workers to form and join organization of their own choosing freely and independently, and the protection of the right to organize and collective bargaining respectively.⁵⁰

The elimination of forced labour principle comprises forced Labour (No. 29) and the Abolition of Forced Labour (No. 105) Conventions prohibiting forced and compulsory labour for all persons. Convention 29 forbids forced labour for private entities and restricts its use by public authorities, whilst convention 105 requires States to implement measures to abolish the use of all forms of forced or compulsory labour.⁵¹

The abolition of child labour principle incorporates the Minimum age (No. 138) and the worst forms of Child Labour (No. 182) Conventions prohibiting any form of migrant child labour. Convention 138 sets specific employment age limits for the admission of children, while convention 182 requires urgent measure to eliminate the worst form of child labour.⁵²

The final principle, equality of opportunity and treatment, includes the Discrimination (Employment and Occupation) Convention (No. 111) and the Equal Remuneration (No. 100) Convention that apply to both nationals and non-nationals, without distinction of status. Convention 111 calls for national policies that promote equality of opportunity and treatment as well as policies that eliminate all forms of

⁴⁸ <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm>

⁴⁹ Ibid.

⁵⁰ International Labour Office *Freedom of association and collective bargaining* (1994) at 23.

⁵¹ Supra note 39 at 122.

⁵² Ibid at 123.

employment discrimination. Similarly, Convention 100 promotes policies for equal remuneration for work of equal value for men and women.⁵³

The above eight core Conventions in the Declaration apply to all workers including migrant workers. All ILO member States are required to comply, regardless of ratification, by virtue of their membership.⁵⁴ In addition to the eight fundamental Conventions provided for in the Declaration, there are some ILO Conventions and Recommendations specifically dealing with migrant workers. These include the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Migrant Workers Recommendation, 1975 (No. 151). The Migration for Employment Convention (Revised) of 1949 deals with standards related to the recruitment and conditions of migrants workers.⁵⁵ However, this Convention does not cover unauthorized migrants as it explicitly mentions legal migrant workers.⁵⁶

2.2.1 ILO Convention No. 143 and Recommendation No. 151 of 1975

In 1975, the ILO adopted Convention No. 143 (also known as Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers) and Recommendation No. 151 in an attempt to regulate/manage increasing flow of irregular (unauthorized) migrant workers.⁵⁷ The convention and its supplementary Recommendation cover both legal and unauthorized migrants. Convention No. 143 contains both provisions protecting basic human rights of all migrant workers and some provisions conferring additional protection to legal/regular migrants.⁵⁸ Under the Convention, unauthorized migrant workers are

⁵³ Ibid.

⁵⁴ Supra note 48.

⁵⁵ Supra note 39 at 129.

⁵⁶ Article 6.1 reads, “Each member for whom this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals...”

⁵⁷ International Labour Organization *International labour migration: A rights-based approach* (2010) 129.

⁵⁸ Supra note 55.

entitled to equal treatment pertaining to remuneration, social security, working conditions and other benefits for past employment.⁵⁹ That is, unauthorized migrants are entitled to equal treatment only for work they have already performed. As far as rights are concerned, this right to equal treatment applies retrospectively, and does not cover circumstances of continued employment of unauthorized workers. Legal/regular migrant workers on the other hand are entitled to this right and more throughout their employment.⁶⁰ As a supplement, Recommendation No. 151 reiterates the principles contained in the Convention and affords additional protections pertaining to social service, family reunification and the health of migrant workers among other things.⁶¹

2.2.2 ILO Multilateral Framework on Labour Migration

The ILO Multilateral Framework on Labour Migration (the “Framework”) is an auxiliary non-binding instrument offering useful principles and guidelines to nations for managing migration policy and practices.⁶² The Framework, adopted in 2005, arose from a need for practical guidance and action in dealing with labour migration in order to maximize its benefits for all involved.⁶³ It addresses various challenges faced by policy makers as well as important themes such as decent work, the protection of migrant workers, and migration governance, among others.⁶⁴ It also contains an annex of best practices to assist policy makers.

⁵⁹ Article 9

⁶⁰ Article 10 reads, ‘Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.’

⁶¹ Supra note 39 at 130.

⁶² Ibid at 131.

⁶³ International Labour Organization *ILO Multilateral Framework on labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006) at VI.

⁶⁴ Ibid.

2.2.3 The UN's international Convention on migrant workers

In addition to the ILO Declaration and Conventions, there is also a UN Convention specifically dealing with migrant labour on an international level. The UN's 1990 'International Convention on the Protection of the rights of All Migrant workers and Members of Their Families' (the "UN Convention") provides comprehensive protections for migrant workers and their families, with some additional provisions for regular/lawful migrant workers.⁶⁵ Like the International Bill of Rights, the UN convention guarantees basic human rights to all migrant workers and their families. The convention affords all migrant workers (including unauthorized migrants) the right to equality of treatment concerning employment among others.⁶⁶ Thus all migrant workers, like nationals, are entitled to the same pay and conditions of work, to join trade unions, to receive emergency medical care, and to transfer their earnings out of the country upon termination of their stay.⁶⁷ Over and above this, legal migrant workers are entitled to equal treatment with respect to protection against dismissals, access to training, housing, and social services.⁶⁸

2.2.4 The impact of international standards on national policies

South Africa, a founding member of both institutions and a major migrant-receiving country in the African region,⁶⁹ is yet to ratify or accede to important international instruments such as the International Covenants, ILO Convention No. 143, or the UN Convention. As a party to both international agreements,⁷⁰ it incurred certain

⁶⁵ Available at <http://www2.ohchr.org/english/law/cmw.htm>.

⁶⁶ Article 25 1 states '*Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.*'

⁶⁷ Supra note 39 at 133.

⁶⁸ Article 54 (1).

⁶⁹ Andre Van Niekerk et al *Law@work* (2008) 19.

⁷⁰ Per s 231 of the Constitution.

international law obligations to enact those international agreements into its national legislation. Since the Constitution, particularly s 232, compels the application of international law in South African law, the courts are obliged to apply these international standards when interpreting South African legislation (including the Bill of Rights).⁷¹ However, given that it had yet to ratify any of these instruments, it has no legal responsibility to fulfil the principles entrenched in these important international instruments governing labour migration. If it has ratified convention No 143 for example, then it would be obliged by ILO Constitution (specifically Article 19, paragraph 5 (d)) to take action to effect the provisions in Convention No 143.⁷²

Despite South Africa's failure to accede to these important international instruments, it is still actively involved in the international community and as a result compelled to apply the fundamental principles contained in both the Universal and ILO Declarations. Implications of which are important for national policy formation pertaining to labour migration governance.

The aforementioned international instruments provide a bed of minimum rights for unauthorized migrant workers. While such international law provides a 'comprehensive normative framework for defining national and international migration policy',⁷³ its impact is still questionable because it relies on the presumption of a global consensus. Their implementation becomes problematic because they are more often than not written with the west in mind and imposed on the rest of the world with little room to manoeuvre. How South Africa incorporates these fundamental principles into its national migration policy to regulate labour migration and still maintain its sovereignty is of significance for the present discussion.

2.3 Regional approach to migration

While migration management at an international level is necessary, regional and national level policies are just as important. South Africa, as a member of the

⁷¹ Supra note 69 at 26.

⁷² Ibid at 21.

⁷³ John Bingham et al. *Guide on ratification of the International convention on the Protection of the Rights of all Migrant workers and Members of Their families* (2009) 5.

Southern African Development Community (SADC), will need to coordinate with fourteen other governments in order to develop an integrated approach to migration management. On top of the list of the shared visions of the SADC region is the liberalization of trade.⁷⁴ Unlike trade liberalization, agreement on the free movement of people within the region was slow to come. In 1997, members of SADC proposed the Draft Social Charter of Fundamental Rights in the Southern African Development Community but did not see any further action until 2003. The initial Draft Charter sought to commit member states to free movement of workers, equal treatment of migrant workers and the establishment of a minimum floor of fundamental rights within the region.⁷⁵ The 2003 Charter seeks to promote the harmonization of legal, economic and social policies within the SADC members. Members are required to give effect to basic labour rights, prioritise core ILO Conventions and create conducive environment where workers (without distinction) enjoy adequate social security benefits.⁷⁶

In addition, in 2005, all member States signed and accepted the Draft Protocol on the Facilitation of Movement of Persons.⁷⁷ Article 3 (c) of the Protocol establishes the right of a citizen from one member State to live and work in the territory of another member State. Article 7 relates to the harmonisation of the various national laws (including statutory rules and regulations) so they are in line with the objectives of the Protocol. The Protocol and its provisions are significant because three of the major migrant-receiving countries in the region (thus South Africa, Botswana and Namibia) opposed initial attempts at introducing agreements on cross-border regulation of this kind.⁷⁸ As far as the Protocol is concerned, protection extends to legal migrants and not those who engage in economic activity

⁷⁴ Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 24.

⁷⁵ Tom Feys 'Labour standards in Southern Africa in the context of globalization: The need for a common approach' (1999) 20 *ILJ* 1445 at 1464.

⁷⁶ Supra note 69 at 29.

⁷⁷ Available at <http://www.sadc.int/index>.

⁷⁸ Supra note 74 at 24.

without prior authorization. The extent to which these regional agreements have been effective is still to be seen.

Chapter 3 Who can and cannot work in South Africa: national immigration policy

South Africa's immigration legislation contains two types of laws: 'laws relating to immigration- the admission of persons to and removal of persons from South African territory; and laws dealing with policy towards immigrants- regulations of non-citizens inside the country's borders.'⁷⁹ The Immigration Act 13 of 2002 contains some progressive amendments altered from previous immigration legislations but the bulk of the act is still an inheritance from the country's racist past.⁸⁰ It is therefore important to review the historical developments that led to the enactment of the current Immigration Act of 2002.

3.1 Historical development: Pre 2002 immigration policies

Nation-wide immigration legislation can be traced back to 1913. Though the Immigration Regulation Act of 1913 and subsequent amendments is beyond the focus of this paper, it is worth mentioning as this sets the tone for current influx control policy. A combination of 'racial anxiety, white nationalism and anti-Semitism' characterized South African immigration legislation in the period prior to apartheid.⁸¹ During this period, no immigration policy regulating Africans from outside South Africa existed. Immigration policies began to focus on immigrants from other African countries under apartheid. In the 1950s and 60s, two important pieces of legislation; the Population Registration Amendment Act of 1950 and the Admission of Persons to the Union Regulation Amendment Act of 1961; were enacted to regulate movement of people into and out of South Africa.⁸² The

⁷⁹ Jonathan Klaaren Immigration & the South African constitution in Jonathan Crush (Ed.) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 56.

⁸⁰ Sally Peberdy & Jonathan Crush Rooted in racism: The origins of the Aliens Control Act in Jonathan Crush (Ed.) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 19.

⁸¹ Ibid at 28.

⁸² Ibid.

Population Registration Act classified people into racial groups and made them carry ID books in order to control and/or identify immigrants inside the country; whilst the Admission of Persons Act encouraged and legitimized police effort to rid the country of immigrants of neighbouring States.⁸³

However, legislation regulating immigration during the rest of the apartheid era were numerous and virtually the same in content. The Aliens Control Act, introduced in 1991, incorporated numerous acts controlling immigrants into a single piece of legislation.⁸⁴ The Act meant to establish policies of the past and set parameters for reform. However, it lacked democratic ‘checks and balances’ because many of the provisions were taken from existing legislation passed by the apartheid government and predecessors.⁸⁵ It suggested that the Aliens Control Act of 1991 was the product of a border-wide transfer of the internal restrictive influx control policy instituted by the apartheid government against black South Africans as a means of controlling domestic migrant labour.⁸⁶ This harsh policy constituted the basis of South Africa’s policy on entry, temporary and permanent residence, and refugee status determination until 1994.

The succeeding 1995 amendment made some substantive changes to the Act.⁸⁷ It removed some of the more blatant violations of the rights of undocumented immigrants. Even with the changes brought about by the amendment, its historical origin still compromised it. Pressures of being a democratic and non-racial South Africa raised the need for new immigration policy and mechanisms of immigration governance void of racial exclusion and domination.⁸⁸ The Immigration Act 13 of 2002 envisioned to curb the negative connotation associated with the previous policies.

⁸³ Ibid.

⁸⁴ Supra note 80 at 33.

⁸⁵ Ibid.

⁸⁶ Jeff Handmaker et al ‘Migration, refugees, and racism in South Africa’ (2001) 20(1) *Refuge* 40 at 41.

⁸⁷ Supra note 80 at 34.

⁸⁸ Supra note 86; Maxine Reitzes Immigration & human rights in South Africa in Jonathan Crush (Ed.) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 41.

3.2 Legislation: Immigration Act 13 of 2002

The Immigration Act 13 of 2002 is the primary South African legislation relevant to immigration. South Africa's national immigration policy is not migrant or immigrant-friendly as it characterizes foreigners as a threat to citizens.⁸⁹ One of the overarching purposes of the act, as stated in the preamble, is to '*set in place a system of immigration control which ensures that...border monitoring is strengthened to ensure that the borders of the Republic do not remain porous and illegal immigration through them may be effectively detected, reduced and deterred.*' The Act regulates both the movement and employment of foreigner workers within the country.

The 2002 legislation serves to control the influx of illegal immigrants whilst protecting the rights of South African citizens and permanent residents by reserving employment opportunities for the latter group.⁹⁰ Section 2(1) (j) reiterates this objective.⁹¹ The preamble and objectives of the Act suggest that only qualified foreigners or those with the needed exceptional skills lacking in the country are encouraged entry for employment purposes. Those identified needed foreigners are then required to obtain the relevant work permits for the kind of work they intend doing in order to be legally recognized. Four different types of work permits; general work permits, quota permits, intra company transfer permits, and exceptional skills permits; are available for issue to foreign workers who meet the necessary requirements.⁹²

⁸⁹ Supra note 74 at 24.

⁹⁰ Ibid at 41.

⁹¹ S2 (1) (j) reads, '*to regulate the influx of foreigners and residents in the Republic to- promote economic growth, inter alia, by- ensuring that businesses in the Republic may employ foreigners who are needed; enabling exceptionally skilled or qualified people to sojourn in the Republic; increasing skilled human resources in the Republic; where applicable, encouraging the training of citizens and residents by employers to reduce employers' dependence on foreigners' labour and promote the transfer of skills from foreigners to citizens and residents.*'

⁹² In addition to the eligibility requirements for work permit stipulated in s 19 (2), applicants are required to provide a letter of motivation and documentary proof from their prospective employer detailing why a citizen/residents could not fill the position, as well as proof of qualifications evaluated by the South African Qualifications Authority. These specific requirements are in addition to an already lengthy and cumbersome general requirement for a Temporary Resident Permit. If

That goes to say not all foreign workers are entirely welcome. It suffices to say foreigners with skills and qualifications already abundant in the South African economy are not wanted and subsequently ineligible for work permits and employment. This is perhaps to ensure that those qualified South Africans and permanent residents already in the country are given first preference in employment opportunities before foreign workers. Only then can legal foreign workers can be considered for employment. Another reason is perhaps to ensure that employment opportunities are created for citizens in order to reduce the country's unemployment rate.

Moreover, to ensure legal adherence, the Act confers regulatory power and authority to the Director-General of the Department of Home Affairs.⁹³ As per s 3 of the Act, to ensure the objectives of the Act are achieved, the Department may take any measure necessary. The Department of Home Affairs (Home Affairs) is therefore the custodian and enforcer of the Immigration Act.⁹⁴ Home Affairs' mandate covers all immigration-related matters, including the issuing of all relevant permits and visas.

Section 38 deals specifically with employment. Section 38 (1) reads, '*No person shall employ- an illegal foreigner; a foreigner whose status does not authorize him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.*' The Act prohibits employers from employing or even assisting (except for humanitarian purposes) unauthorized/illegal foreigners with employment.⁹⁵ Employers are obligated to check the status of those whom they employ and to inform the Department on a regular basis.⁹⁶ The Act further places a criminal sanction on the employment of unauthorized foreigners. Meaning, it is an offence for employers to employ unauthorized foreigner worker or any person in 'violation of

these requirements are anything to go by then obtaining a valid work permit can be quite a demanding and costly task.

⁹³ S 3.

⁹⁴ S 2.

⁹⁵ S 42(1).

⁹⁶ S 38(2).

the Act'. The penalty of which is a fine or imprisonment not exceeding one year for first time offenders.⁹⁷ Foreigners on the other hand are required to remain within the terms and conditions of their status;⁹⁸ failure to do so will result in a penalty of a fine or imprisonment for no more than 18 months.⁹⁹

South Africa has a long history of population control, from apartheid internal movement restrictions to broader nation-wide border control. The Aliens Control Act and its predecessors ensured South Africa's borders, both internal and external, were closed off to unwanted people at all cost. Even with its progressive elements, the Immigration Act, 2002 mirrors that of pre 1994 apartheid immigration policy.¹⁰⁰ Like its predecessors, the 2002 Act is selective in the kinds of foreigners it allows entry and criminalizes unauthorized foreign workers and employers who employ them. Despite attempts to keep South Africa's borders tightly guarded, the Act has not successfully kept all unwanted people out.

Chapter 4 Labour Law jurisprudence: interpreting the Immigration Act

It is a common contention that the peremptory nature of s 38 of the Immigration Act coupled with the criminal sanction contained in s 49 makes any employment contracts concluded contrary to the Act invalid and legally unenforceable.¹⁰¹ However, nowhere in this Act does it specifically invalidate employment contracts entered into with unauthorized foreign workers. As far as workers' contractual rights are concerned, the Act only makes it illegal to provide work for foreigners without valid permits and criminalizes any action contrary to this caution, it makes no mention of the contract once the Act is breached. Essentially the Immigration Act was intended to discourage employers from knowingly making use of unauthorized foreign workers. Does this go to say an employment contract entered into with an

⁹⁷ S 49(3).

⁹⁸ S 43 (a).

⁹⁹ S 49(6).

¹⁰⁰ Supra note 86.

¹⁰¹ Craig Bosch 'Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342 at 1347; Rochelle Le Roux 'The world of work: Forms of engagement in South Africa' (2009) 2 Development and Labour Monograph Series at 35.

unauthorized foreign worker is valid? These were the issue brought to the Commission for Conciliation, Mediation and Arbitration (CCMA) and Labour Court for adjudication.¹⁰²

4.1 Pre-2008 CCMA cases

In 2001, the CCMA had to decide, in *Moses v Safika Holdings (Pty) Ltd*,¹⁰³ whether an applicant who did not have the relevant work permit was debarred from pursuing an unfair dismissal dispute under the Labour Relations Act.¹⁰⁴ The applicant was a United States citizen who worked in South Africa without a work permit as required by s 26 (1) (b) of the Aliens Control Act 96 of 1991.¹⁰⁵ In order for the CCMA to have jurisdiction over the dispute, it was necessary to show that the applicant was an employee as defined in the LRA. After taking into consideration s 213 of the LRA, s 23(1) of the Constitution, general principles of contract law and the Aliens Control Act, the Commissioner dismissed the application. The Commissioner reasoned that whilst the definition of ‘employee’ in s 213 of the LRA in its literal interpretation would ideally cover unauthorized foreigner workers, however ‘employee’ does not cover those whose acts are unlawful.¹⁰⁶

Likewise, in 2003, the CCMA heard an unfair dismissal dispute, in *Vundla v Millies Fashions*,¹⁰⁷ in which the employment of a Zimbabwean woman was terminated. The applicant, Ms Vundla, gained employment as a sales assistant with Millies Fashion. She was later requested by her employer to produce documents confirming her legal status. She was unable to produce proof and her employment was consequently terminated. The CCMA dismissed her unfair dismissal dispute

¹⁰² The CCMA is an independent dispute resolution body established in terms of the 1995 LRA to replace the old Industrial Court system. As an independent body, it does not have affiliations with any trade union, political party or business.

¹⁰³ (2001) 22 ILJ 1261 (CCMA).

¹⁰⁴ Act No. 66 of 1995 (hereafter “the LRA”).

¹⁰⁵ At 1263.

¹⁰⁶ Para 18 at 1267.

¹⁰⁷ (2003) 24 ILJ 462 (CCMA).

referral without further evaluation of the merits of the case because there had been no dismissal since her employment was in contravention of immigration law.¹⁰⁸

Similarly in *Georgieva-Deyanova v Craighall Spar*,¹⁰⁹ the CCMA, upon hearing a dismissal matter concerning a foreign woman who did not have a work permit, held that it had no jurisdiction to hear the dispute because the contract of employment was unenforceable because the employment violates the Immigration Act.

The general approach followed by these cases concerning labour rights of unauthorized workers has been thus far consistent. In all three cases, unauthorized workers were disqualified from any labour protection, as they did not fit the definition of ‘employee’ in the LRA because their employment contracts breached the Aliens Control Act or Immigration Act. It is therefore necessary to assess this crucial theme underpinning South African employment law, i.e. the notion of who is an employee.

4.1.2 Who is an employee? Persons who do not fit the ‘employee’ concept South Africa’s labour legislation is often premised on a formal employment relationship involving a common-law contract of employment, and as such, persons who do not fit the ‘employee’ concept are purposefully excluded from legislative protection.¹¹⁰ The definition of ‘employee’ is thus the starting point in determining the nature and scope of the protection afforded by most of the country’s labour statutes.¹¹¹

A case in point is the LRA. As per s 213 of the LRA, an ‘employee’ is defined as –
*‘(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 (b) any person who in any manner assists in carrying on or conducting the business of an employer, and “employed” and “employment” have meanings corresponding to that of “employee”.’*

¹⁰⁸ At 466.

¹⁰⁹ (2004) 9 BALR 1143 (CCMA).

¹¹⁰ *The world of work: Forms of engagement in South Africa* (supra note 102) at 29.

¹¹¹ Van Niekerk et al at 61.

One can discern from the above definition two trends: part (a) of the definition suggests elements of common-law contractual agreement, whereas the part (b), when considered in isolation, reveals a broader wording that could be read to include other employment arrangements beyond common-law understanding.¹¹² Yet the sole reliance on the common law understanding of ‘employee’ in South African employment legislation is rather limiting. A problem arises when work is actually performed in the absence of a valid contract. This tends to be particularly problematic in the case of unauthorized foreign workers. They clearly have a work agreement with whomever they provide services for but because of legislative prohibition (such as the one imposed by the Immigration Act) any agreement is illegal, ergo contract invalid. Going by the common law understanding of the term ‘employee’ alone, unauthorized foreign workers among other atypical workers do not fit the notion of ‘employees’ because they have no legal employment contract with their employers and therefore not entitled to labour protections.¹¹³

However, the mere fact that legislation prohibits or invalidates employment contracts entered into with unauthorized workers does not take away the existence of an actual work relationship. This paradox together draws attention to the complexities in characterizing an employment relationship. Craig Bosch¹¹⁴ advocates the recognition of unauthorized workers as employees and the extension of labour protection to them, albeit subjected to some limitation. In Bosch’s view, only ‘vulnerable migrant workers’ should be deserving of labour protections, not those who ‘wilfully disregard and flout the requirements of the Immigration Act’.¹¹⁵ He bases his argument on s 10 (right to dignity) and s 23 (1) (right to fair labour practice) of the Constitution. Despite its challenging implications, his proposal is compelling and finds favour with the courts (see *Discovery case*) and this paper.

¹¹² Ibid.

¹¹³ Craig Bosch ‘Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?’ (2006) 27 *ILJ* 1342 at 1364.

¹¹⁴ Ibid at 1360.

¹¹⁵ Ibid.

4.2 The landmark *Discovery Health* case

Migrant workers may enter a country legally and later become unauthorized, sometimes through no fault of their own.¹¹⁶ This was the situation in *Discovery Health Ltd v CCMA & Others*.¹¹⁷ This case is important because it endorsed access of unauthorized workers to the dispute-resolution mechanisms of the CCMA.¹¹⁸ The approach adopted in this case differed from that of a previous similar case on two accounts: firstly, a contravention does not invalidate an employment contract. Secondly, the definition of employment in s 213 of the LRA does not necessarily rely on an employment contract, as is often assumed.¹¹⁹ As a result, an unauthorized worker can still possibly seek the protections of labour legislation.

4.2.1 Brief facts

The case was about the alleged unfair dismissal of an Argentinean working at Discovery Health.¹²⁰ Discovery Health offered Mr. Lanzetta, the respondent, employment that he took. At the onset, and during his employment with Discovery, Lanzetta was using the work permit from his previous job with Multi-Path Customer Solutions. Four months before this permit was to expire (i.e. September), Mr. Lanzetta requested the necessary documentation to renew his existing work permit from Discovery. Discovery's management got back to him with the necessary documents on the 2nd of December 2005, a few weeks before his existing permit expired. Mr. Lanzetta continued to work for Discovery on his temporary residence permit. However, on the 4th of January 2006, he received a letter from Discovery management terminating his employment. Discovery identified his lack of a valid work permit as a reason for his employment termination. He then referred an unfair

¹¹⁶ International Labour Organization *International labour migration: A rights-based approach* (2010) 99.

¹¹⁷ (2008) 29 ILJ 1480 (LC) (hereafter 'the Discovery case').

¹¹⁸ Dieudonne Coffie Wabo 'Emerging jurisprudence on the labour law protection for undocumented migrant workers in South Africa: Lessons for countries' (2009). Available at www.ilera-online.org/15thworldcongress/.../CS1W_28_COFFIE.pdf

¹¹⁹ Jonathan Klaaren 'Human rights protection of foreign nationals' (2009) 30 ILJ 82 at 89.

¹²⁰ (2008) 29 ILJ 1480 (LC) at 1485-6.

dismissal dispute to the CCMA. The Commissioner held that Mr. Lanzetta was an employee, and that the CCMA had jurisdiction to determine the unfair dismissal dispute despite Discovery's argument to the contrary. Discovery then referred the matter to the Labour Court (LC) for review.

4.2.2 Legal issues to be decided

Upon review, the LC had to settle on two issues; the first being whether the contract of employment concluded between Discovery Health and Lanzetta was invalid because Lanzetta did not have a permit issued under the Immigration Act that entitled him to work for the applicant. The second being whether the statutory definition of 'employee' relies on a valid common law contract of employment. Concisely, the crucial question before the court was 'does the definition of "employee" in s 213 of the LRA depend on a primary valid underlying contract of employment?'¹²¹

4.2.3 Rationale and judgment

Concerning the issue raised in the review, the court held in favour of Mr. Lanzetta on both accounts. In deciding whether there was a valid contract of employment between Discovery Health and Lanzetta, the court reviewed the peremptory and criminal sanction provisions of s 38 (1) and s 49 (3) of the Immigration Act respectively. Van Niekerk AJ reasoned that ss 38(1) and 49(3) do not directly declare that an employment contract concluded without the necessary permit becomes invalid.¹²² Looking at these two provisions and s 23(1) of the Constitution together, Van Niekerk found for Lanzetta on both counts. The Court found the employment contract concluded between Discovery and Lanzetta was to be valid despite the lack of a valid work permit. Van Niekerk reasoned that 'by criminalising only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying contract'.¹²³ As a

¹²¹ At 1492.

¹²² At 1488.

¹²³ Para 33 at 1491.

result, Lanzetta was an ‘employee’ as defined by s 213 of the LRA and permitted to refer his unfair dismissal dispute to the CCMA. The Court went further, albeit obiter, to say that even if the contract was to be invalid because Discovery was not allowed to employ Lanzetta under s 38(1) of the Immigration Act, he was still an ‘employee’. The reason for this being that the definition of ‘employee’ as contemplated in the LRA is not reliant on a valid and enforceable employment contract.¹²⁴ In reaching this conclusion the LC considered s 213 of the LRA, the provisions of s 23 (1) of the Constitution, as well as relevant international standards. Van Niekerk, in his reasoning, stated ‘...a contract of employment is not the sole ticket for admission into the golden circle reserved for “employees”, the fact that Lanzetta’s contract was contractually invalid only because Discovery Health had employed him in breach of s 38 (1) of the Immigration Act did not automatically disqualify him from that status’.¹²⁵

The *Discovery* judgment is important because it extends labour law protection to unauthorized foreign workers. While the decision will find favour with the equality of treatment campaigns of the ILO and the UN, the decision has become contentious. Norton contests the interpretation of the Immigration Act adopted by Bosch and the LC in *Discovery*. In her view, the expansive interpretation adopted in *Discovery* in circumstances of dismissal is flawed and for many reasons.

Firstly, the decision in *Discovery* that a contract with an unauthorized worker is still valid is wrong because it is common cause in South African law that a contract in contravention of a statute is invalid.¹²⁶

Secondly, she argues that the reasoning adopted by the court to the effect that the Immigration Act intended criminalizing only the conduct of an employer who employs a foreign worker without a lawful permit is incorrect. In Norton’s view, the Immigration Act imposes a criminal penalty on both the employer and employee for

¹²⁴ Para 57 at 1498.

¹²⁵ Para 51 at 1496.

¹²⁶ Dawn Norton ‘Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers’ (2010) 31 *ILJ* 1521 at 1549.

violating its provisions.¹²⁷ Norton makes a compelling point in the sense that the fact that sections 42 and 49 (3) explicitly imposes criminal sanctions on the employer does not deter from the fact that the employee is somewhat implicated. It can be reasonably assumed that s 43 (a) read together with s 49 1 (a) of the Act intended proportioning a certain amount of criminal penalty to the employee too.

Finally, Norton argues that the Court's recognition of the invalidity of such contracts, the Act intended to prevent employers from forming working relationships with unauthorized foreigners.¹²⁸ Therefore, to acknowledge the contract valid will be to permit the very scenario the legislature intends prohibiting.¹²⁹ More so, the Act is a source of distinguishing unauthorized workers from citizens and those with legal permits.

Despite Norton's well-argued oppositions to the *Discovery* judgment, the decision is law. As far as current jurisprudence is concerned, the position is simple: an unauthorized foreign worker (though employed in contravention of the Immigration Act has a valid and enforceable contract of employment) is an 'employee' for the purposes of the LRA, and has the right to approach the adjudication system to seek relief in labour matters. Whether this decision affects the way employers treat unauthorized foreign workers in other labour matters is yet to be decided. Because of the *Discovery* decision however, the CCMA has taken a stance on its jurisdiction in these cases. In 2008, an official directive was issued instructing commissioners to accept jurisdiction for all dispute referrals involving unauthorized foreigners.¹³⁰

Chapter 5 Extending legislative protection to unauthorized foreign workers

Almost all South African legislation refers to complying with international law. However, migrants, particularly unauthorized foreign workers, benefit from very

¹²⁷ Dawn Norton 'In transit: the position of illegal foreign workers and emerging labour law jurisprudence' (2009) 30 *ILJ* 66 at 77.

¹²⁸ Supra note 114 at 1348.

¹²⁹ Supra note 127.

¹³⁰ Supra note 111 at 36.

little legislative protections at their place of work.¹³¹ Despite well-known international standards on treatment and conditions (such as those governing hours of work, minimum wage, occupational health and safety, non-discrimination, and freedom of association) at work applying to all workers; migrant workers are often afforded very little, if any, legal rights.¹³² They often encounter unequal treatment and opportunities as well as discriminatory behaviour where they work. The protection or extension of basic human and labour rights in the workplace to foreign workers is imperative. This does not suggest that unauthorized foreign workers should necessarily be entitled to the full protection of all labour legislation, only those substantive ones that would ensure the prevention of their gross exploitation. Accordingly, this chapter discusses the core issue of whether or not foreigners working in South Africa without authorization are deserving of labour protection.

5.1 Constitutional approach to human rights and labour protection

South Africa possesses one of the most progressive constitutions in the world. Chapter 2 of the South African Constitution,¹³³ commonly known as the Bill of Rights, grants a variety of political, cultural and socio-economic rights to all people living in the country.¹³⁴ The Constitution, containing the Bill of Rights, applies to all law and binds the legislature, executive, judiciary as well as all organs of State.¹³⁵ It is the supreme law of the land and supersedes all laws. Additionally, all provisions in the Constitution, with the exception of two specific ones (right to vote and the right to engage in freedom of trade, occupation and profession), applies to all people living in South Africa.¹³⁶ Therefore, foreign workers, legally or illegally in the

¹³¹ Jonathan Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 *International Migration* 103 at 104.

¹³² Supra note 117 at 172.

¹³³ Constitution of the Republic of South Africa 1996, Act 108 of 1996 (hereafter "the Constitution").

¹³⁴ Supra note 132 at 103.

¹³⁵ Dieudonne Coffie Wabo 'Emerging jurisprudence on the labour law protection for undocumented migrant workers in South Africa: Lessons for countries' (2009). Available at www.ilera-online.org/15thworldcongress/.../CS1W_28_COFFIE.pdf

¹³⁶ Jonathan Crush 'The dark side of democracy: Migration, xenophobia and human rights in South Africa' (2000) 38 *International Migration* 103 at 110.

country, ideally have the same entitlement to rely on the Bill of Rights as citizens or residents.¹³⁷

Human rights tend to be synonymous with constitutional rights in South Africa. International law is well established in the South African Constitution. As per the Constitution (s 39 (1) (b) and s 233) the courts are obliged to consider international law when interpreting the Bill of Rights or any legislation for that matter.¹³⁸ In view of that, the democratic rights of human dignity, equality and freedom embedded in the Bill of Rights are constitutionally salient.¹³⁹ For that reason, the courts have acknowledged that *‘Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. While that person happens to be in this country, for whatever reason, it must be respected, and is protected, by s 10 of the Bill of Rights. The inherent dignity of all people is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.’*¹⁴⁰ This lends support to the notion that all people, regardless of status, in South Africa ideally share a set of basic human rights as envisaged in the Universal Declaration of Human Rights. Yet the basic human rights of foreign workers in South Africa are seldom protected.

In addition to human rights provisions, the Bill of Rights also guarantees the protection of certain fundamental labour rights to all workers- the Constitution actually refers to ‘everyone’. Section 23 constitutionally entrenches a number of fundamental workers’ rights central to labour relations. Section 23 (1) explicitly states that ‘everyone has the right to fair labour practices’. The general use of the term ‘everyone’ in s 23 (1) and elsewhere in the Bill of Rights has generated debates about the proper interpretation and scope of the Bill.¹⁴¹ The absence of specific demarcation of this right has yielded interpretation arguments by the courts, and has

¹³⁷ Johan De Waal et al *The Bill of Rights handbook* (4th ed.) (2001) 90.

¹³⁸ Van Niekerk et al (2008) 21.

¹³⁹ Du Toit et al. *Labour relations law: a comprehensive guide* (2003) 59.

¹⁴⁰ In *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 4 SA 326 (SCA) at 330.

¹⁴¹ The term ‘everyone’ is used frequently in the Bill of Rights: in ss 23 (1), 9 (1), 10, and 11 to name but a few.

ultimately led to major developments in jurisprudence.¹⁴² The courts have been forced to broaden the scope of s 23 (1) beyond common law employment relationship. The LAC, in *Kylie v CCMA*,¹⁴³ had to review whether the constitutional provision ‘right to fair labour practices’ applies to a person engaged in illegal employment. The court held that all persons engaged in activity akin to an employment relationship, even those engaged in illegal employment, are potentially entitled to s 23 constitutional rights. The ratio being that s 23 is intended to preserve the dignity and protect vulnerable workers, such as sex workers, against exploitation.¹⁴⁴ This ruling is congruent with Le Roux’s proposal of giving labour practices provision in s 23 (1) a broader construction so that dismissals, unilateral variation to employment contract or disciplinary actions all constitute labour practices regardless of the legality of the employment.¹⁴⁵

It is commonly accepted that the rights contained in the Bill are not absolute and can be subjected to infringement or limitation as far as the limitation serves a legitimate purpose in a constitutional democracy.¹⁴⁶ While the legality (or lack thereof) of unauthorized employment may justifiably warrant a limitation to the legislative protection to fair labour practices, limiting the application of the Bill to unauthorized workers may encourage employers to abuse these vulnerable workers further.¹⁴⁷ Besides, if a worker engaged in illegal work (as in the case of a sex worker) is entitled to the protection of s 23 (1), what more an unauthorized foreign worker whose only transgression is his status?

¹⁴² Supra note 139 at 33.

¹⁴³ *Kylie v CCMA and Others* (2010) 4 SA 383 (LAC). This case involved a sex worker who was allegedly dismissed by her employer. She referred an unfair dismissal case to the CCMA but the Commissioner refused to hear the case, reasoning that it lacked jurisdiction because the aggrieved was engaged in illegal employment. Upon review, the Labour Court upheld the CCMA decision reasoning that she was not entitled to the LRA’s protection against unfair dismissal because her employment contract was invalidated because of the illegality of her profession.

¹⁴⁴ Para 26H at 390.

¹⁴⁵ Rochelle Le Roux ‘The Meaning of “worker” and the road towards diversification: Reflecting on Discovery, SITA and “Kylie”’ (2009) 30 *ILJ* 49 at 58.

¹⁴⁶ S 36 (1). Supra note 138 at 162.

¹⁴⁷ ‘Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?’ (Note 114) at 1351.

Still, the State is compelled to respect, protect, promote and fulfil the rights accorded in the Bill of Rights.¹⁴⁸ Since the language used in most of the provisions is rather vague, and seeing that ‘everyone’ incorporates a wide scope of people, the State or any other decision-maker cannot then deliberately alter the wording of the provisions to suit their own agenda. Therefore, it stands to reason that unauthorized foreign workers are technically entitled to the provisions in the Bill without further limitations unless an internal limitation clause, such as those found in s 23 (5) or (6) creates such a special limitation.¹⁴⁹ The general term ‘everyone’, coupled with s 7 (1) of the Constitution and the LAC ruling in *Kylie*, all point to the fact that all workers, even those engaged in prohibited work, are covered by s 23 (1). It suffice to say that unauthorized foreign workers are entitled to the constitutional right to fair labour practices in their employment in the same way that citizens, residents or legal workers are.¹⁵⁰

5.2 Individual labour protection

Constitutional provisions formally state workers’ social, individual and collective labour rights in South Africa. In addition, a host of legislations enacted to give effect to the Constitution provide substantive statutory rights to workers. The primary statutes providing worker protections are:¹⁵¹

Statute	Protections
Labour Relations Act 66 of 1995	Freedom of association, collective bargaining and protection against unfair dismissal
Occupational Health and Safety Act 85	Health and safety in the workplace

¹⁴⁸ S 7 (2).

¹⁴⁹ Supra note 138 at 165.

¹⁵⁰ Supra note 148 at 1351. S 7(1) enshrines the rights of ‘all people’ in South Africa.

¹⁵¹ Table adapted from Paul Benjamin ‘Informal work and labour rights in South Africa’ (2008) 29 *ILJ* 1579 at 1580.

of 1993, Mine Health and Safety Act 29 of 1996	
Compensation for Occupational Injuries and Diseases Act 130 of 1993, Occupational Diseases in Mines and Works Act 78 of 1973	Compensation for work-related injuries and diseases
Employment Equity Act 55 of 1998	Anti-discrimination
Basic Conditions of employment Act 75 of 1997	Hours of work, leave, pay
Unemployment Insurance Act 63 of 2001	Unemployment benefits

5.2.1 Basic conditions of employment

The protection of basic conditions of employment in relation to remuneration, working time, and health and safety are important to ensure unauthorized workers are safeguarded from employer exploitation and abuses. Migrant workers, the world over, take up the most unsanitary low-skilled jobs. These jobs tend to be physically demanding and require workers to work for very long irregular hours with very little daily or weekly rest periods between.¹⁵²

The Basic Conditions of Employment Act (BCEA)¹⁵³ regulates conditions of employment, in particular those concerning pay and working hours. The scope of application of the BCEA, unlike the LRA, includes a wider category of people in its classification of ‘employee’ and thus in its protections. The BCEA goes a step further from the usual common-law definition of employee to include people who

¹⁵² International Labour Organization *International labour migration: A rights-based approach* (2010) 83.

¹⁵³ Act No. 75 of 1997 (hereafter ‘the BCEA’)

work at least 24 hours in a month for an employer in its provisions.¹⁵⁴ There are provisions for working hours, overtime pay, leave/rest periods and protection for night work along with others. While the BCEA does not directly regulate the position of unauthorized foreign workers, it leaves scope for policy-makers to adopt appropriate measures when needed.¹⁵⁵ For instance, s 55 (4) (k) allows the Minister of Labour to set minimum employment conditions for persons other than employees.¹⁵⁶ In addition, s 83 allows the Minister to deem any category of persons to be employees for purposes of the whole or any part of the BCEA, any other employment law, or any sectoral determination.¹⁵⁷ Despite the fact that the BCEA allows for the potential extension of minimum floor of rights to unauthorized workers, the Minister of Labour has yet to use this administrative power to extend special protection to vulnerable workers like these.

International law is silent on the issue of employment conditions of unauthorized migrants who are still engaged in employment. Even with international law regulating their conditions, albeit for past work done, South Africa has not acceded to any of these important Conventions; with the exception of Convention 100, Equal Remuneration. Though Convention 100 specifically advocates for equal remuneration for work of equal value for men and women, it can be read to apply to unauthorized migrants too. As previously discussed, migrant workers experience frequent pay discrimination in relation to services offered. If Convention 100 allows for equal pay for men and women for work of equal value, why can it not apply to unauthorized migrants? Surely their involvement in equal (if not superior) work, though illegal, like nationals or legal migrants warrants them the same remuneration for their efforts.

The ILO estimates that work-related accident rates are twice as high amongst migrant workers as amongst native workers in Europe.¹⁵⁸ One would imagine the

¹⁵⁴ Marius Olivier 'Extending labour law and social security protection: The predicament of the atypically employed' (1998) 19 *ILJ* 669 at 680.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Supra* note 156 at 683.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Supra* note 153 at 106.

prediction for those in Africa is the same, if not higher. Health and safety protection is therefore important for migrant workers because of the type of work they find themselves doing. In South Africa, unauthorized foreign workers tend to be concentrated in agriculture, mining, construction and service sectors of the economy.¹⁵⁹ These sectors are dubbed high-risk and hazardous. Agriculture, mining, construction are considered the three most hazardous sectors of employment.¹⁶⁰ For instance, it is estimated that about 170 000 of the 335 000 annual fatal workplace accidents worldwide involve agricultural workers.¹⁶¹ Similarly, construction accounts for 2 to 4 times the average incidences of fatal accidents.¹⁶² The high risk of work-related injuries and diseases of migrants owes much to the physical and time requirements of their jobs.

The Occupational Health and Safety Act 85 of 1993 (OHSA) and Mine Health and Safety Act 29 of 1996 (MHSA) are the primary laws pertaining to health and safety at work. Provisions of the OHSA apply to all people in the workplace, regardless of employer-employee relationship.¹⁶³ Likewise, everyone who works on a mine is an employee for the purposes of the MHSA.¹⁶⁴ In theory, these Acts apply to unauthorized foreign workers too, but in reality the situation is different. Unauthorized workers are unlikely to report incidences of dangerous working conditions out of fear of losing their jobs or from fear of detection. Moreover, they are often unable to access occupational health and safety-related social security benefits such as health insurance and other employment injury coverage for various reasons (see discussion under social protection). Compounding this issue further is the fact that migrant workers are often accused of being a threat to public health and

¹⁵⁹ Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 13.

¹⁶⁰ Supra note 153 at 85.

¹⁶¹ Ibid.

¹⁶² Ibid at 88.

¹⁶³ EML Strydom (Ed.) *Essential social security law* (2001) 240.

¹⁶⁴ Paul Benjamin 'Informal work and labour rights in South Africa' (2008) 29 *IJL* 1579 at 1599.

a burden on State funds.¹⁶⁵ This adds to gross prejudice and discriminatory treatment.

5.2.2 Discrimination

Often foreign workers, both legal and undocumented, encounter unequal treatment and other discriminatory behaviours in host countries.¹⁶⁶ This, coupled with the increasing exploitation of unauthorized workers in the workplace, makes employment discrimination a matter of concern. Given South Africa's racist past, discrimination in employment is expected. Employment discrimination can manifest in hiring, remuneration, substantive benefits, conditions of employment and general treatment in the workplace.¹⁶⁷ South Africa has a duty under international law (ILO Convention No. 111) to endeavour to eliminate all forms of employment discrimination, and to promote equality of opportunity and treatment for all workers. At the end of apartheid, South Africa introduced an equity framework in an attempt at weakening institutionalized inequality and fulfilling its international obligations.¹⁶⁸ It did so through constitutional and legislative protections of employment equity.

The Constitution is at the forefront of a host of legislative prohibition against unfair discrimination. It provides legal protection against charges of 'reverse discrimination' by allowing the implementation of affirmative action measures to eliminate discrimination in employment.¹⁶⁹ Likewise, the equality clause (s 9) in the Bill of Rights prohibits direct or indirect discrimination by the State and individuals on certain listed grounds. However, since there is other legislation giving effect to this constitutional provision, one cannot directly rely on the Constitution in the case

¹⁶⁵ Supra note 153 at 107.

¹⁶⁶ Ibid at 80.

¹⁶⁷ Carol Agocs 'Systematic discrimination in employment: Mapping the issue and the policy responses' in Carol Agocs (Ed.) *Workplace inequality: International perspective on legislation, policy and practice* (2002) 1.

¹⁶⁸ Ibid at 27.

¹⁶⁹ S9 (2).

of unfair discrimination.¹⁷⁰ At most, the Constitution can only be used to interpret discrimination legislation enacted to give effect to the fundamental right to equality in the Constitution.¹⁷¹

On the other hand, the Employment Equity Act¹⁷² (EEA), enacted to give effect to the Constitution, can be challenged if it is deficient in protecting the constitutional right not to be discriminated against, as it is the core legislation regulating equality and discrimination in employment. Chapter 2 of the EEA prohibits unfair discrimination against designated groups on a number of listed grounds.¹⁷³ Section 6 (1) of the EEA explicitly reads: *'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'* These listed grounds are consistent with the listed grounds contained in s 9 (3) of the Constitution. Similarly, the LRA guarantees employees the right not to be unfairly discriminated against. Section 187 (1) (f) of the LRA renders any dismissal purely on any of the above listed grounds automatically unfair.¹⁷⁴

The coverage of the above employment discrimination policies is wide reaching, yet all these statutes tend to exclude migrants, including unauthorized foreign workers, from their ambit. The exclusion of these workers from discrimination protection can be attributed to the definition of 'employee' (like in the

¹⁷⁰ Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th ed.) (2005) 77. The Courts, by principle, are not permitted to apply the Bill of Rights directly in a legal dispute where there is ordinary law intended to give effect to the rights contained in the Bill. Accordingly, in cases of unfair discrimination in employment, any court will first have to apply the EEA, and give a generous interpretation to give effect to the Bill, before directly applying the Bill.

¹⁷¹ Van Niekerk et al (2008) 34.

¹⁷² Act 55 of 1998.

¹⁷³ Section 1 defines 'designated groups' as referring to black people, women and people with disabilities.

¹⁷⁴ Frank Horwitz and Harish Jain 'Employment equity in South Africa: Overcoming the apartheid legacy' in Carol Agocs (Ed.) *Workplace inequality: International perspective on legislation, policy and practice* (2002) 225.

LRA), omission of employment status in the list of protected grounds (such as those found in the Constitution, EEA, and LRA), and/or failure to include migrant workers in the list of designated groups. While these national discrimination policies dictate the extent of discrimination protection and to whom, international law (specifically ILO Convention 111) does not limit its application to people with valid employment contracts. The failure of policy-makers to extend these important constitutional and legislative bans on employment discrimination to migrants leaves them defenseless against potential negative differential treatment in the workplaces. It further marginalizes and excludes them from their workplace, and increases societal inequality simultaneously.¹⁷⁵

Inequality in employment is not an isolated phenomenon. As the workplace exists within a wider society, it is bound to mimic the broader society. Thus, social relations in the workplace are a reflection of the structure of the surrounding society.¹⁷⁶ Statutes like the EEA are only a part of a larger framework aimed at reducing social inequality.¹⁷⁷ In 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)¹⁷⁸ was enacted to provide supplementary protection against unfair discrimination, harassment and hate speech, as well as to promote equality in broader society.¹⁷⁹ Despite attempts to prohibit discrimination in civil society and employment practices; xenophobia, hatred, intolerance and discriminatory behaviours against foreigners persist. In May 2008, the country watched as foreigners (both legal and unauthorized) were harassed and attacked by frustrated South Africans in a wave of xenophobic violence that swept through the country's townships and informal settlements. The aftermath of this was rather shocking: 62 foreigners were killed and about 100 000 displaced, and these figures

¹⁷⁵ Jonathan Crush et al (2005) at 27.

¹⁷⁶ Supra note 169 at 5.

¹⁷⁷ Ibid at 22.

¹⁷⁸ Act 4 of 2000 (PEPUDA).

¹⁷⁹ Supra note 175.

only reflect the reported incidents.¹⁸⁰ The 2008 conflict was not just a once off display of frustration, but reflected the deep tensions embedded in South African society.¹⁸¹ Central to these xenophobic tensions are competition for scarce resources and the perceptions that non-nationals pose a significant threat in terms of limited opportunities and resources.¹⁸² While these behaviours may be a broad societal malady, the treatment of foreign workers in the workplace is no different.

Xenophobia, as understood in social science, is an irrational fear or hatred of foreigners by nationals against non-nationals.¹⁸³ In South Africa, xenophobia is depicted by racism and increased degree of violence against other Africans. Handmaker *et al* assert that the general inability of South Africans to tolerate and accommodate differences is in large part owed to apartheid regime and South Africa's past exclusion from the international community.¹⁸⁴ Whilst xenophobia is not a new phenomenon, the recent 'Afro-phobia' (i.e. black-on-black hatred) is largely based on unfounded myths and stereotypes underpinned by ignorance, with foreigners often used as scapegoats for local social and economic problems.¹⁸⁵ Nationals often blame foreigners, particularly those from other African countries, for the soaring crime rate, unemployment, the HIV/Aids pandemic, and lack of social services among other things.¹⁸⁶ The preamble of the Immigration Act obliges the State to challenge xenophobia, yet government is unhelpful in improving the situation. South African immigration law effectively criminalizes unauthorized foreign workers by characterizing them as 'illegal'.¹⁸⁷ The International Organization

¹⁸⁰ OHCHR *Vulnerability of migrants-in particular women & children –to xenophobic violence* (2011); Jean Pierre Misago et al *Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa* (2009) 7.

¹⁸¹ Ibid.

¹⁸² Jeff Handmaker et al 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refuge* 40 at 45.

¹⁸³ Ibid at 44.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ The term 'illegal foreigner' can be found throughout the Immigration Act but particularly in ss 1 and 32.

for Migration (IOM) attests that the dubbing of immigrants as ‘illegal’ lends support to the criminalization and subsequent discrimination of foreigners.¹⁸⁸ By making use of the label ‘illegal’ in the news, policies and political discourse, the media and policy-makers, are essentially depicting migrants as criminals deserving of punishment.¹⁸⁹ This imagery subsequently gives weight to the ill-treatment of foreign workers by law enforcers and the community at large. Moreover, this form of typecasting of migrants strengthens ‘us vs. them’ attitudes and cast foreigners as a threat to citizens, leaving foreigners feeling inferior and marginalized.¹⁹⁰

5.2.3 Dismissals

The LRA is the legislation primarily governing dismissals in employment. The provision contained in s185 ensures that the statutory right not to be unfairly dismissed is protected at all times.¹⁹¹ Despite the wide coverage of the LRA regarding dismissal protection, unauthorized foreign workers were largely excluded from protection against unfair dismissals because of its emphasis on an existing employer-employee relationship.¹⁹² That is until the landmark *Discovery* case that changed the way the courts viewed foreign workers and their labour rights.

Still, the reliance on employer-employee relationship for dismissal protection is evident in the LRA’s definition of dismissal. A ‘dismissal’, according to s186 (1), occurs when –

- ‘(a) an employer has terminated a contract of employment with or without notice;*
- (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;*

¹⁸⁸ Jean Pierre Misago et al *Towards tolerance, law, and dignity: Addressing violence against foreign nationals in South Africa* (2009) 17.

¹⁸⁹ Ibid.

¹⁹⁰ Supra note 175 at 236.

¹⁹¹ Marius Olivier ‘Extending labour law and social security protection: The predicament of the atypically employed’ (1998) 19 *ILJ* 669 at 681.

¹⁹² Ibid.

(c) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;

(d) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.'

Most of the components of s 186 (1) refer to the termination of a contract of employment. As a result, one can infer from the above definitions that a worker with no valid employment contract (such as an unauthorized foreign worker) is automatically disqualified from the coverage of s 186 (1) and subsequently from claims of unfair dismissals in terms of the LRA. Looking at the prerequisite of s 186 (1) alone, the LRA on the face of it intends excluding unauthorized foreign workers from enjoying the statutory right not to be unfairly dismissed.¹⁹³ Without doubt, the otherwise exclusion of unauthorized foreign workers from dismissal protection sounds reasonable considering their illegal status as workers. Yet it has since been established that illegality arising from a legislative prohibition does not necessarily strip one of all his legislative protections, as a mere prohibition does not render an employment contract invalid.¹⁹⁴ If a worker involved in a prohibited job (such as the case of a sex worker) is entitled to legislative protection from unfair dismissal,¹⁹⁵ then surely the prohibited worker (such as an unauthorized foreign migrant) assuming a 'legitimate job' should be equally protected. The unauthorized foreign worker should be afforded the same protection because, unlike the sex worker, the

¹⁹³ S 185.

¹⁹⁴ Le Roux (2009) at 34.

¹⁹⁵ In *Kylie*, the LAC decided all persons (even those involved in illegal employment, such as sex workers) are entitled to the protection of s 23 (1) of the Constitution. The extension of the constitutional right to fair labour protection to these vulnerable workers also entitle them to the LRA's protection against unfair dismissal albeit subjected to certain limitation in terms of the appropriate relief/remedy.

prohibition concerns the status of the person doing the job rather than the job itself.¹⁹⁶

A continuous exclusion of unauthorized foreign workers from claims of unfair dismissals in terms of the LRA will be problematic because it makes it easier for employers to exploit them and retrench them at a whim, exacerbating their already vulnerable position. Employers will dismiss unauthorized workers without due process defending that these workers have no entitlement to labour law protection because of their status.¹⁹⁷ The Constitutional Court, in *National Education Health & Allied Workers Union v University of Cape Town & Others*,¹⁹⁸ recognized that the right not to be unfairly dismissed in s 185 is essential to the constitutional right to fair labour practices.¹⁹⁹

In attempt to afford these precarious workers some protection, Bosch suggests a broader, more inclusive interpretation of s 186 (1) without changing the overall application of the Act. He proposes reading-in ‘termination of an employment relationship’ into the definition, so s 186 (1) (a) would ideally read as follows, ‘*an employer has terminated a contract of employment **or employment relationship** with or without notice.*’²⁰⁰ If Bosch’s submission is to be favoured then workers who do not have valid employment contracts, but are employees for all intents and purposes, will be covered by the definition. The LC in reaching its decision in the *Discovery* case incorporated some of Bosch’s proposition. Both the *Discovery* and *Kylie* judgments essentially extend the constitutional right to fair labour practices to illegal workers in circumstances of dismissal. These important jurisprudences ultimately extend labour law protection and the opportunity to seek

¹⁹⁶ *Kylie v CCMA and Others* (2010) 4 SA 383 (LAC). At 391.

¹⁹⁷ Dawn Norton ‘Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers’ (2010) 31 *ILJ* 1521 at 1525.

¹⁹⁸ (2003) 24 *ILJ* 95 (CC).

¹⁹⁹ At 114.

²⁰⁰ Craig Bosch ‘Can unauthorized workers be regarded as employees for the purposes of the Labour Relations Act?’ (2006) 27 *ILJ* 1342 at 1361.

redress to unauthorized foreign workers.²⁰¹ The *Discovery* case ultimately changed the way the courts approached labour rights of unauthorized foreign workers concerning dismissals. Both the *Discovery* and *Kylie* judgments make it possible for unauthorized workers to make use of the relatively cheap mechanisms of the CCMA to secure their labour and other rights.

A fitting step after hearing a successful case of unfair dismissal dispute will be for the commissioner to determine appropriate relief. However, awarding an appropriate remedy in successful unfair dismissal cases concerning unauthorized workers is challenging. Remedies for successful proof of unfair dismissal is contained in s 193 of the LRA. The primary remedies awarded for unfair dismissal provided for by s 193 should be reinstatement first; if this is not possible then re-employment. Only when the first two avenues have been explored to no avail should compensation be considered for specific reasons (precisely in that exact order). A commissioner or arbitrator must consider ordering the reinstatement or re-employment of the dismissed employee as a first choice and award compensation as the last resort. Remedial issues become problematic when the aggrieved employee is an unauthorized foreigner. It seems rather imprudent to expect a reasonable decision-maker like an arbitrator to order the reinstatement or re-employment in the case of someone who had been working unlawfully in the first place.²⁰² An order of reinstatement or re-employment of unauthorized foreign worker will undermine national law, as it would be seen as condoning or encouraging future violations of immigration laws. This leaves us with the option of compensation. The LRA permits a decision-maker to sidestep the ordering of reinstatement or re-employment and go straight to awarding compensation in special circumstances. The Commissioner may order compensation if the employee does not desire to be reinstated/re-employed; or the employment relationship becomes intolerable owing to the dismissal. Alternatively, a Commissioner can order compensation if reinstating or re-employing is not reasonably practicable for the employer; or if the dismissal did not follow a

²⁰¹ Dieudonne Coffie Wabo 'Emerging jurisprudence on the labour law protection for undocumented migrant workers in South Africa: Lessons for countries' (2009). Available at www.ilera-online.org/15thworldcongress/.../CS1W_28_COFFIE.pdf

²⁰² In *Kylie*, the LAC recognized that the full range of remedies available in terms of the LRA cannot necessarily be available to someone in illegal activity.

fair procedure.²⁰³ Without much deliberation, one can discern that the circumstance of unauthorized workers comfortably fits into the scenario envisaged in s 193 (2) (c) for reasons discussed above. In line with Bosch's reasoning, the appropriate remedy for the unfair dismissal of unauthorized workers will be to award them a just and equitable compensation amount.²⁰⁴ Accordingly, the CCMA has since established Commissioners ought to order compensation in successful cases and oppose any review application challenging this approach.²⁰⁵

5.3 Social protection

There appears to be a link between immigration policies and access to social security. Social security systems of host nations are such that they generally exclude unauthorized foreign workers.²⁰⁶ Social protection within the SADC region is not at all integrated,²⁰⁷ so migrant workers have to rely on social security laws in the country they find themselves. In South Africa, there appears to be a lack of social security protection for foreign workers for reasons that will be made clear further down.

The ILO conceptualizes social security as; *'the protection which society provides for its members, through a series of public measures, against the economic and social distress that would otherwise be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old-age and death and the provision of medical care and*

²⁰³ S 193 (2).

²⁰⁴ Supra note 201 at 1363.

²⁰⁵ Le Roux (2009) at 36.

²⁰⁶ Ockert Dupper 'Migrant workers and the right to social security: An international perspective' in Becker, U & Olivier, M (Eds.) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) 17.

²⁰⁷ Daleen Millard 'The portability of social security benefits: The position of non-citizens in South Africa and the Southern African Development Community' in Becker, U & Olivier, M (Eds.) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) 155.

subsidies to families with children'.²⁰⁸ While this definition has been criticised as being too narrow, the South African understanding of social security provides a much broader scope. According to the South African White Paper for Social Welfare, '*social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children...*'.²⁰⁹ Both definitions cover two dimensions of social security measures, thus social insurance and social welfare. The former definition (thus the contributions made by employers and employees to formalized plans such as pensions, health insurance, workmen's compensation and unemployment benefits) is of interest here.²¹⁰ Nonetheless, it must be mentioned that it is difficult to lobby for the extension of social welfare provisions to unauthorized workers because provision tend to be based on residency or nationality as they are generally non-contributory and subject to the discretion of government to determine eligibility.²¹¹ For the purpose of this discussion, only social insurance protection will be the focus.

According to the ILO, migrant workers are often engaged in sectors of the labour market that are 'not covered by social security or in which compliance with social security laws is poorly enforced'.²¹² Migrant workers, specifically unauthorized foreign workers, have no or very limited access to social protection and rights to long-term benefits.²¹³ While granting of the same access to coverage and benefits entitlement to migrant workers as to native workers may be too idealistic, it

²⁰⁸ International Labour Organization *International labour migration: A rights-based approach* (2010) 108-9.

²⁰⁹ EML Strydom 'Introduction to social security law' in Strydom, EML (Ed.) *Essential social security law* (2001) 23.

²¹⁰ Supra note 207 at 19.

²¹¹ Mathias Nyenti 'Adjudication and enforcement mechanisms and the administrative framework: A South African perspective' in Becker, U & Olivier, M (Eds.) *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (2008) 55.

²¹² Supra note 209 at 109.

²¹³ Ibid.

is necessary for migrant workers to have some proper rights to social security protection. However, securing social security protection for unauthorized foreign workers is particularly difficult for various reasons. The first and obvious reason relates to their legal status. Unauthorized foreign workers are usually barred from social security benefits due to their ‘illegal’ status as their employment is in contravention of legislation.²¹⁴ Granting unauthorized workers access to social insurance benefits will be rewarding them for breaking the law.

The second reason points to the fact that almost all social security rights are usually related to nationality, periods of employment, contributions or residency.²¹⁵ Foreign workers, with the exception of permanent residents, are predominantly excluded from South African social security coverage, including all social assistant benefits, because citizenship is used as eligibility criteria for accessing some, if not most, of the social insurance system.²¹⁶

The last and perhaps the most pertinent reason why it is difficult to lobby for the extension of social welfare provisions to unauthorized workers is that the South African social security system grants social insurance benefits based on employee-status. Generally people who qualify as “employees” or “contributors” or similar such term are entitled to benefits.²¹⁷ The reliance of social insurance schemes on a presupposed formal contract of service with an employer is problematic because the definition of “employee” by the relevant laws tends to exclude certain categories of people from its ambit who would otherwise fit the concept.²¹⁸ The Unemployment Insurance Act (UIA)²¹⁹ uses the term ‘employee’ as the criteria to grant unemployment benefits. Section 3 (1) (b) particularly emphasizes the common law interpretation of ‘employee’ by referring to contract of employment. The UIA excludes certain categories of workers, including foreign workers who have to be

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Marius Olivier ‘Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalized’ (1999) 20 *ILJ* 2199 at 2207.

²¹⁷ Ibid at 2201.

²¹⁸ Supra note 207 at 48.

²¹⁹ Act No. 30 of 1966 (hereafter “the UIA”).

repatriated at the termination of their services from its provisions.²²⁰ The exclusion of foreign workers requiring repatriation after service termination is an indication that unauthorized foreign workers, who are not legally regarded as employees, cannot enjoy the protection of the unemployment insurance scheme. Subsequently, these workers are excluded from enjoying temporary financial assistance during unemployment envisaged by the Unemployment Insurance Fund (UIF) as it is governed by the UIA. Similarly, unauthorized foreign workers are precluded from protection against workplace injuries and diseases as health and safety insurance/benefits tend to focus on common law contractual relationship. The Compensation for Occupational Injuries and Diseases Act,²²¹ defines an ‘employee’ as a ‘person who has entered into or works under contract of service or of apprenticeship or learnership with an employer...’²²² Though COIDA does not explicitly exclude unauthorized workers from its ambit, its fixation on common law definition of the concept of ‘employee’ does not leave scope for their inclusion. Likewise, unauthorized mineworkers are excluded from the application of the Compensation for Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA).²²³ These statutes essentially conclude that unauthorized workers are not entitled to compensation for disablement or death resulting from occupational injuries and diseases in the course of their employment.

Most often, policy-makers use the argument that unauthorized foreigner workers are burden on the government as they cost more in public services and welfare payments than they contribute through taxes and social security contributions to rationalize their exclusion.²²⁴ While this assertion is difficult to prove for various reasons, the reverse seems more plausible for the mere fact that unauthorized workers are unlikely to apply for welfare or other similar benefits out

²²⁰ S3 (1) (d).

²²¹ Act 130 of 1993 (hereafter “COIDA”)

²²² S1 (xviii).

²²³ J.E. Myers, D. Garisch and J.E. Cornell ‘Compensation for occupational diseases in the RSA’ (1987) 71 *SAMJ* 302 at 303.

²²⁴ International Labour Organization *International labour migration: A rights-based approach* (2010) 67.

of fear of detection, victimization or deportation.²²⁵ The constant exclusion of foreign workers from the field of social security raises some concerns.

The first of these concerns relates to its constitutionality. Section 27(1) (c) of the Constitution explicitly states that ‘everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance’.²²⁶ Based on the phrasing of s 27 (1) (c) read with the equality provision in s 9,²²⁷ it can be argued that the Constitution guarantees and protects the right (of access) to social security to everyone, including unauthorized foreign workers.²²⁸ However, those who oppose the protection of foreign workers may argue that the right to social security is subjected to internal limitation contained in s 27 (2) as well as the general limitation provision contained in s 36.²²⁹ It is accepted that no one right is absolute and as such, any right can be limited provided the limitation complies with s 36. The argument here is that the right to social security provided for by s 27 (1) (c) of the Constitution already has internal limitations, i.e. s 27 (2), and so should not be limited any further, justifiably or otherwise. By granting all workers, even unauthorized ones, the right to access to social security mechanisms, the government is fulfilling its constitutional obligation to respect, protect and fulfil the rights in the Bill of Rights.²³⁰

Apart from the realization of constitutional imperative, the extension of social security protection to foreign workers is important for one other reason. South Africa, being part of the international community, has a duty to comply with international instruments dealing with the protection of the right to social security. Though international instruments like the ILO Convention No. 102 of 1956 on Social Security (Minimum Standards) has no legal effect on South Africa due to lack

²²⁵ Supra note 209.

²²⁶ Act No. 108 of 1996.

²²⁷ S9 (1) and (2) grants to all the right to equal protection and full enjoyment of all rights and freedoms.

²²⁸ Supra note 217 at 2209.

²²⁹ S27 (2) states ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.

²³⁰ S7 (2) requires the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

of ratification, it is important that South Africa utilises some of the guidelines to improve the position of migrants. Regardless, South Africa's fulfilment with the Universal Declaration of Human Rights is vital as its provisions are binding. Article 22 of the Universal Declaration unambiguously states 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.²³¹ Read with Article 2, the Declaration essentially grants unauthorized foreign workers the same social security protection as it would native workers. While it is unlikely for unauthorized foreign workers to apply for welfare and other benefits in the social security system out of fear of detection, it is nonetheless important to have some coverage extended to them because their lack of social protection adds to their social exclusion from the society.²³²

5.4 Collective labour protection

The right to organize and to form trade unions has been identified by the ILO as fundamental in the world of work,²³³ yet unauthorized foreign workers are denied the freedom to associate and collectively bargain. While a collective voice at work can help unauthorized workers in securing rights and improving their working conditions;²³⁴ they are barely considered employees in South African law, let alone worthy of trade union representation.

The Constitution provides for fundamental collective labour rights such as freedom of association, including collective bargaining and the right to strike.²³⁵ The constitutional entrenchment of freedom of association and collective bargaining indicates the importance of these collective rights to workers for negotiating

²³¹ Available at <http://www.un.org/en/documents/udhr/>

²³² Supra note 217 at 2206.

²³³ Supra note 209 at 80.

²³⁴ Ibid.

²³⁵ S23 (2).

favourable conditions for themselves. Section 23(2) (a) of the Constitution states that ‘every worker has the right to form and join a trade union’. At a glance, it may appear the term ‘worker’ is premised on a contract of employment. However, the Constitutional Court ruled that the term ‘worker’ as used in s 23 (2) can be extended to include relationships akin to an employment relationship.²³⁶ In reaching this decision, the Court considered ILO Conventions 87 and 98. However, the extent to which this constitutional provision applies to unauthorized foreign workers is uncertain. Unauthorized workers will probably be precluded from the provisions of chapter II of the LRA because they tend to be concentrated in the informal economy and do not enjoy the same protected rights to freedom of association.²³⁷ Nevertheless, if they satisfy the definition of ‘employees’ as contained in the LRA, and they do (as ruled in the *Discovery* case), then they qualify for collective labour protection. Unauthorized foreign workers, like nationals are entitled to the constitutional and statutory right to associate and organize to further their interests.

Moreover, the fundamental principle of freedom of association and the effective recognition of the right to collective bargaining, in the ILO Declaration on Fundamental Principles and Rights at Work, applies to unauthorized foreign workers too. Convention No.87 recognises the right of workers (without distinction) to form and join organizations of their own choosing; while Convention No.98 calls for the protection of workers from anti-union discrimination, and governments to encourage the development of voluntary negotiation between employers and workers.²³⁸ The wording of Article 2 of Convention 87, which clearly states that ‘workers and employers, without distinction whatsoever...,’ suggests unauthorized workers, despite their unlawful status are inclusive in the term ‘workers’. For the same reason, these workers can then be said to be ‘workers’ in terms of s 23 (2) of the Constitution and thus entitled to collective labour rights. Despite the availability of these fundamental rights to unauthorized workers, trade union movements are reluctant to organize and/or represent these workers. According to Norton, it makes sense that the unwillingness of trade unions to represent these workers stems from

²³⁶ *SANDU v Minister of Defence* (1999) 4 SA 469 (CC)

²³⁷ Paul Benjamin ‘Informal work and labour rights in South Africa’ (2008) 29 *IJL* 1579 at 1590.

²³⁸ International Labour Office *Freedom of association and collective bargaining* (1994) at 23.

the view that unauthorized migrants are ‘transient and responsible for stealing jobs’ from locals.²³⁹ Absence of union representation means absence of collective agreements to regulate these workers and consequently no legal protection is accorded to these workers. Until unions are ready to change their stance on unauthorized workers and become committed to include them in their cause, these workers will continue to be vulnerable as their legal position limits their power to secure and enforce their rights.

The statutes explored repeatedly reveal that labour law protects people who fit into the definition of ‘employee’. In most cases, the definition excludes a large number of deserving people from the coverage. Without international fundamental rights, unauthorized workers will be left with no employment protections. Extending the rights and benefits in labour law to include unauthorized workers may be as simple as broadening inclusion provisions and minimising/eliminating exclusion provisions in the relevant statutes.

Chapter 6 Implications and challenges: impact of migration on South Africa

Positive contributions of migrant workers to host countries have received very little attention. Nevertheless, regularizing labour migration can have positive effects for South Africa’s labour market.

6.1 Implications

Regulating migrant labour can have some positive socio-economic impact on South Africa. As consumers, foreign workers (authorized or not) make significant contributions to economic growth.²⁴⁰ Their consumption of and demand for goods and services indirectly create employment for others.²⁴¹ Likewise, foreign workers (unauthorized or legal) contribute to the economy positively by filling labour market

²³⁹ Dawn Norton ‘Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers’ (2010) 31 *IJL* 1521 at 1524.

²⁴⁰ Tom Feys ‘Labour standards in Southern Africa in the context of globalization: The need for a common approach’ (1999) 20 *IJL* 1445 at 1475.

²⁴¹ *Ibid.*

needs in low-skill segments of the market.²⁴² Migrants doing jobs that local South Africans will avoid ensures the economy does not come to a standstill. Moreover, migrants contribute to the country by promoting entrepreneurship. It has been proven that migrants tend to be more entrepreneurial compared to their native counterparts.²⁴³ The establishment of kiosks, ‘spaza’ shops and/or small businesses in and around South African communities stimulates the informal economy while generating new jobs for migrants and locals alike.²⁴⁴ Migration, while it may contribute to the country, if not managed properly may adversely affect the economy.

6.2 Challenges

It is well argued that immigration leads to unemployment and greater job insecurity for local workers.²⁴⁵ Yet wages of migrants tend to be lower than that of local workers.²⁴⁶ While this may be true in reality, migrants may still pose a big threat to job security of locals. Considering the high unemployment rate, the arrival and employment of large-scale unskilled unauthorized foreigners in South Africa may be to the economic disadvantage of those locals who compete with them.²⁴⁷ The only people who stand to benefit from unauthorized workers are the urban elite who enjoy their cheap labour. If government regularized these workers, they would lose their competitive advantage as the preferred prospective employees as their legal position will be on par with nationals thus reducing the competition for local jobs.²⁴⁸

What’s more, unauthorized workers pose a real threat to pay and working conditions. Migrant workers, especially unauthorized ones, are generally willing to

²⁴² Robert Rowthorn ‘The economic impact of immigration’ (2004) 2.

²⁴³ Supra note 209 at 57.

²⁴⁴ Ibid.

²⁴⁵ Supra note 242 at 3.

²⁴⁶ International Labour Organization *International labour migration: A rights-based approach* (2010) 62.

²⁴⁷ Supra note 242 at 3.

²⁴⁸ Supra note 240 at 1475.

take work that the local workforce prefers to decline because of low wages. Because of this, employers are more than willing to substitute local workers with the available pool of unauthorized foreign workers.²⁴⁹ If this trend is not halted, wages and employment conditions of the local workforce will continue to erode because migrant labour will be used to cut the wage bill.²⁵⁰ The lack of regulation will result in the likelihood of employers using unauthorized workers to push down costs, depreciate employment conditions and squeeze nationals out of work.²⁵¹ Pushing the local workforce out of work will not only put pressure on the social welfare system (thus unemployment insurance, housing, and healthcare) and government, it may even lead to frustration and resentment by the local workforce. This resentment will ultimately manifest in the form of growing xenophobia, hatred and intolerance against foreigners. Extending legal protection to these workers will reduce downward pressure on wage and working conditions, as they would no longer be preferred over nationals.

Besides that, the extension of legislative protection to unauthorized foreign workers raises various challenges for the various stakeholders involved. The first of these are trade union movements. Trade union movements may very well be important role players in extending minimum protection to unauthorized employees.²⁵² However, unions are primarily concerned with protecting the interests and job security of their members; this includes, and is not limited to, negotiating for higher wages and better employment conditions for their members. Perhaps their reluctance to deal with this category of workers is strategic. Negotiating for the very people who can derail their cause seems foolhardy. As suggested by Olivier, unions fear that increasing the use of unauthorized workers may further weaken their impact

²⁴⁹ Supra note 247 at 63.

²⁵⁰ Toby Shelley *Exploited: Migrant labour in the new global economy* (2007) 137.

²⁵¹ Ibid.

²⁵² Marius Olivier 'Extending labour law and social security protection: The predicament of the atypically employed' (1998) 19 *ILJ* 669 at 685; Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 26.

in employment negotiations.²⁵³ Unions' hesitation to engage in the extension debate is understandable.

From labour providers' perspective, extending legislative protection to unauthorized workers is an all-lose situation. The availability of these workers means they do not have to employ local workers who enjoy extensive legal protections. In their existing status, these workers are attractive to prospective employers. Regularizing their status will mean legal protection and no exploitation.

For policy-makers, extending rights to these workers is not politically sound. On the one hand, the government has a duty to put the citizen's interest at the forefront of their agenda. Politicians are often pressured by voters to eliminate 'illegal foreigners' and to restrict the migration process entirely. On the other hand, the same government has signed various international and regional treaties to uphold and respect the rights of people. While it would be hypocritical for the government to act contrary to international obligation, it cannot be seen to endorse "illegal activity". There is no easy solution as the different stakeholders have conflicting interests.

Nevertheless, conditions will continue to be dire for unauthorized migrants for as long as the government directs its efforts at criminalizing and 'policing' of undocumented workers. Exploitation of migrants will intensify and the little support for the idea of migrant rights may diminish entirely if better policies are not instituted to manage clandestine migration.

Chapter 7 The way forward: towards policy changes

Viewing migration as a triangular relationship comprising of different stakeholders with different or conflicting interests creates perspective. On one side, you have employers who want cheap imported labour because they want to reduce labour costs, in the middle, you have migrants who sometimes bypass border control without detection and on the other side, and you have officials who are under pressure to control immigration.²⁵⁴ Most often, people direct all their attention to

²⁵³ Ibid.

²⁵⁴ Robin Cohen Migration and its enemies: Global capital, migrant labour and the nation-state (2006) 175.

unauthorized migrants and the need to control them, very little of their attention is focused on the one force pulling them in, employers. It is no surprise most enforcement measures target employees, not employers; whose demand stimulates unauthorized cross-border movement.²⁵⁵

7.1 From control to management

South Africa's national immigration policy thus far has focused too much on enforcement, control and exclusion.²⁵⁶ These kinds of policies are too costly and often ineffective.²⁵⁷ A 2003 IOM report estimated the annual cost of enforcing immigration restrictions (thus border controls, issuing of visas and passports, apprehending, detaining, prosecuting and deporting unwanted migrants, inspecting labour condition) to be around 30 billion US Dollars.²⁵⁸ In addition to the focus on excessive control, there seems to be very little policy coherence.²⁵⁹ The Immigration policy and policies regulating labour (such as the Constitution, LRA), including the courts, are not consistent when it comes to the rights of unauthorized workers. South Africa cannot afford to invest too many resources into keeping unwanted people out. The government should perhaps consider measures that are directed at management, while stimulating development, rather than control.²⁶⁰ The country is likely to benefit from a new immigration policy that focuses less on issues of security and rather more on the current realities of the nation's labour requirements in a human-rights context.²⁶¹ In doing so, South Africa will be able to adopt a more coherent set of policies that will allow it to respond to its own needs and demands whilst protecting

²⁵⁵ Jeff Handmaker et al 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refuge* 40 at 41.

²⁵⁶ Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 24.

²⁵⁷ Supra note 256 at 48.

²⁵⁸ Supra note 255 at 210.

²⁵⁹ International Labour Organization *International labour migration: A rights-based approach* (2010) 146.

²⁶⁰ Supra note 256 at 48.

²⁶¹ Ibid.

rights of all migrant workers.²⁶² Furthermore, implementing policies to curb unauthorized migration is simply not enough. Unauthorized migration is no longer a matter of security, but rather a decent work issue, and should be treated as such.²⁶³

7.2 Unauthorized workers as a Decent Work Agenda

The extension of the scope of protection to unauthorized workers should be seen in the context of the ILO's Decent Work Agenda (DWA). The aim of the Agenda is two-fold, thus to promote:

'(a) opportunities for all men and women of working age, including migrant workers to obtain decent and productive work in conditions of freedom, equity, security and human dignity.

*(b) access for all to freely chosen employment, the recognition of fundamental rights at work, income to enable people to meet their...needs...and adequate level of social protection for workers and their families.'*²⁶⁴

As a development strategy, measures intended to achieve equality, the rights and basic social protection of all workers are central to the Decent Work Agenda.²⁶⁵ By treating the situation of unauthorized workers as a Decent Work Agenda, the government is acknowledging that work plays an important role in people's lives, particularly vulnerable people like unauthorized workers. As such, these workers need to have their rights respected and protected. Through the Decent Work Agenda, policy-makers will be in a position to amend and enforce laws that will safeguard these workers from further vulnerabilities. In doing so, these workers will have the minimum protection they deserve, purely because of their marginalization.²⁶⁶ Possibly coupling the Decent Work approach with an extension of a more targeted minimum set of rights will ensure the protection of unauthorized workers.

²⁶² Supra note 260.

²⁶³ Ibid at 176.

²⁶⁴ International Labour Organization *ILO Multilateral Framework on labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006) at 5.

²⁶⁵ International Labour Organization *Facts on labour migration* (2006) 2.

²⁶⁶ Ibid.

7.3 Towards more targeted core rights

Most measures needed to govern labour migration and ensure adequate protection for migrant workers are in various international human rights and labour instruments.²⁶⁷ Yet South Africa has not or perhaps seems reluctant to adopt these international standards in full. The government's reluctance to ratify important Conventions such as the ICESCR or ICCPR is concerning. While universal fundamental human rights are important for the protection of unauthorized foreign workers, policy-makers need to move away from these general declarations of human rights and focus more on targeted core rights that meet the needs of these workers effectively.²⁶⁸ Thus, the focus should be on policies and measures that are consistent with international standards and at the same time support legal migration.²⁶⁹ Revising the current Immigration Act, so it still contains sanctions discouraging the employment of unauthorized workers without effectively criminalizing the workers themselves, will be a step in the right direction.²⁷⁰

Likewise, barriers restricting the mobility of low-and-semi-skilled persons can be done away with. Home Affairs can be instrumental in providing opportunities for the migration of low-skilled workers.²⁷¹ Most often, it is the administrative difficulties and frustrations encountered in Home Affairs that deter people from using the legal channel. In the Western Cape alone, services and at times information tend to differ across the different Home Affairs branches. The government needs a more consolidated and less bureaucratic administrative procedure that is inexpensive, receptive and efficient. While these cannot be achieved overnight, something needs to be done in the short-term to address some of these issues.

Perhaps the Minister of Home Affairs could make use of the discretionary power conferred by s 31 (2) (b) of the Immigration Act 13 of 2002 to grant

²⁶⁷ Supra note 260 at 146.

²⁶⁸ Robin Cohen Migration and its enemies: Global capital, migrant labour and the nation-state (2006) 201.

²⁶⁹ Supra note 260 at 147.

²⁷⁰ Ibid.

²⁷¹ Ibid at 167.

unauthorized foreign workers a concession.²⁷² Based on s 31 (2) (b), the Department of Home Affairs should consider implementing its plans to grant 'Special Temporary Permits' like the proposed 2009 'special dispensation permits' for Zimbabweans.²⁷³ These special permits should not only cover SADC citizens but all unauthorized foreign workers in South Africa. The special permit can be issued for duration of twelve or eighteen months depending on circumstances, allowing these workers the right to legally live and work. During the time, these workers should be encouraged to seek the necessary legal documentation before the expiration of their special dispensation permits; failure to do so can then warrant their deportation or other such measures. This would assist the government in its efforts to manage clandestine migration. These Special Temporary Permits issued to undocumented foreign workers already in the country will benefit all stakeholders. This measure of regularizing the legal status of previously unauthorized workers will afford them legislative protection, negate their conflict with trade unions as well as attract positive international recognition and support for the country as a whole.

Furthermore, xenophobia and hostility is rife in South Africa. Xenophobic attitudes and sentiments are salient in every level of South African society. It is reflected in the media, government policies and political discourse. If the May 2008 events are anything to go by, then xenophobic sentiments directed at unauthorized workers and foreigners in general need to be addressed. Perhaps increased anti-xenophobia awareness campaigns directed at changing society's perceptions will be beneficial.²⁷⁴ Specific programmes aimed at educating both the public and service

²⁷² S 31 (2) (b) states that 'Upon application, the Minister, as he or she deems fit, after consultation with the *Board*, may under terms and conditions determined by him or her allow-grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision; provided that the Minister may-

(i) exclude one or more identified foreigners from such categories: and
(ii) for good cause, withdraw such right from a foreigner or a category of foreigners.'

²⁷³ Consortium for Refugees and Migrants in South Africa 'Regularizing Zimbabwean migration to South Africa' (2009) *Migration Policy Brief* at 2. In April 2009, the Department of Home Affairs made known its intention to grant Zimbabweans in the country a special dispensation permit, enabling them to live and work in the country legally for a year.

²⁷⁴ Jeff Handmaker et al 'Migration, refugees, and racism in South Africa' (2001) 20(1) *Refuge* 40 at 48.

providers (especially law enforcement as they are seen as legitimizing xenophobia) on the rights and entitlements of different categories of migrants, may help in reducing intolerant attitudes.²⁷⁵

Conclusions

The onset of globalization with its advancement in ICT has changed the world significantly. Commodities have become increasingly easy to move worldwide and international markets have become more and more interconnected. In order for countries to be successful in the global arena, they have had to embrace globalization and all its consequences. The rise of globalization has offset an increase in international cross-border movements. A significant amount of the world's population is believed to reside outside of their country of origin. While people may leave their country of origin by choice, many are forced out by circumstances beyond their control. Whatever the reason for migration, economic factors (mainly the prospect of a better standard of living) is a major pull factor for many people. However, not all migration occurs legally. There tend to be a small, but significant, proportion of people who make it through porous borders despite complex immigration laws and border controls. These people incur great risks in getting to their destination and even greater difficulties in staying undetected. They face multiple disadvantages and legal hurdles as they find themselves on the periphery of their host economy with no proper official documentations.

Despite South Africa's embrace of neo-liberal economic policies (thus the free movement of international trade and capital) post democracy, the government is still unprepared for the surge in the movement of people, particularly those of clandestine nature. In a bid to curb the movement of people, the government introduced its best immigration policy yet. The Immigration Act 13 of 2002 is intended to restrict and control the inflow of immigrants into the country. However, this institutionalized regulatory measure, intended to police the admission and employment of foreigners, has not been completely successful. There are still people living and working in the country without being in possession of valid work permits.

²⁷⁵ Jonathan Crush et al *Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration* (2005) 28.

These people, unauthorized foreign workers as they are aptly termed, are a strong indication of the sort of conflict between South Africa's legal regimes. They not only portray the tension between immigration and labour laws, but also reflect a range of vulnerabilities as they are formally excluded from access to significant legal and social protections. Their exclusion creates opportunity for further marginalization, exploitation and even criminalization. For that reason, access to labour and social protections for unauthorized workers is of crucial concern. Many times, these workers are unaware of, or afraid to pursue, these or any other rights. The fear of detection and deportation prevents them from joining trade unions, securing protection against health and safety hazards, claiming compensation for injury or illness or even maintaining employment security.

Unauthorized foreign workers usually possess limited legal rights in their place of employment. They tend to be involved in low-skilled, highly hazardous work with little legal regulations. They work for longer hours, are paid much less and are easier to dismiss than citizens or residents. They may put up with dangerous working conditions because of fear of drawing attention to themselves, losing their jobs and/or deportation. They also encounter many restrictions concerning social security coverage. This is mainly because most social insurance measures do not cover those outside of formal employment relationships. It is important for these workers to work in conditions that do not risk their health and safety, enjoy adequate rest from work, free from discrimination, and enjoy protection from physical and economic risks.

Yet South African labour law is premised too much on the concept of employment contract. The definition of 'employee', included in most of the labour laws, is the starting point in determining the nature and scope of the protection afforded by these laws. The persistent exclusion of these foreign workers from the cover of 'employee' results in their prohibition from enjoying certain constitutional, individual and collective labour protections as well as social protection. The degrading and inhumane treatment of unauthorized foreign workers will persist for as long as crucial legislative provisions exclude unauthorized workers because they do not fit the definition of 'employee'. The lack of protection granted to these vulnerable workers in the field of labour law and social security helps in furthering their exclusion and marginalization from wider society. The only way to prevent

employers from exploiting unauthorized foreign workers further is by extending some labour regulation coverage to them. The extension of a minimum floor of basic human and labour rights in the workplace to these workers is a good start to ensuring these particularly vulnerable people are safeguarded. Besides, the South African government has a duty to comply with the equal treatment pledge in the Constitution and signed international treaties, to protect the rights of all who live in South Africa.

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